Supreme Court, U.S.
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No. 94-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GOODMAN HOLDINGS AND
ANGLO IRISH BEEF PROCESSORS INTERNATIONAL,
Petitioners,

v.

RAFIDAIN BANK,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Must a contract designate the United States as the place of payment in order for the nonpayment by a foreign sovereign to establish jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.*?

PARTIES TO THE PROCEEDING

Petitioners, Goodman Holdings and Anglo Irish Beef Processors International, were appellants below. Respondent, Rafidain Bank, was appellee below.

Pursuant to this Court's Rule 29.1, petitioners note that Anglo Irish Beef Processors International is a wholly-owned subsidiary of Goodman Holdings. Neither company has any parent, subsidiary, or affiliated company that has issued shares or debt securities to the public.

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PETITION FOR WRIT OF CERTIORARI

Goodman Holdings and Anglo Irish Beef Processors International respectfully petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the dismissal of this action for lack of subject-matter jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.*

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 26 F.3d 1143 (1994) and is reprinted at Appendix ("App.") 1a-9a.

The District Court's unreported decision dismissing this action is reprinted at App. 13a-30a.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on June 24, 1994. Petitioners filed a timely Petition for Rehearing with Suggestion for Rehearing En Banc, which was denied on September 7, 1994. App. 11a-12a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISION

28 U.S.C. § 1605(a)(2). General exceptions to the jurisdictional immunity of a foreign state.

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

* * * *

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

STATEMENT OF THE CASE

This case arises from the confluence of two historical trends: (1) the increasing participation of governmental entities in commercial activity and (2) the rise of the United States as a hub of international finance. Foreign governments now routinely fund commercial transactions either wholly or partly through banks located in this country, and the resulting financial activity substantially affects the entire American economy. Judicial interpretation and application of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.* ("FSIA" or "Act"), however, has failed to keep up with these significant economic developments. In particular, the lower courts are

divided on whether and when a foreign sovereign subjects itself to suit in an American court by funding commercial transactions through bank accounts in the United States. This case presents an appropriate—and timely—vehicle for this Court to bring judicial decisionmaking up to speed with commerce, confirming the United States' preeminent role in the global economy.

Petitioners Goodman Holdings and Anglo Irish Beef Processors International (collectively "Goodman") are corporations organized under the laws of the Republic of Ireland, and are in the business of processing and selling beef, lamb, and other meats around the world. App. 32a. Between March 1986 and January 1989, they sold vast quantities of meat to three companies owned by the Government of the Republic of Iraq. *Id.*, at 13a-14a. As payment, respondent Rafidain Bank and the related Rasheed Bank, both wholly owned by the Iraqi Government, issued fourteen irrevocable letters of credit, involving more than $400 million, in Goodman's favor. *Id.*, at 37a.[1]

Altogether, between November 1987 and July 1990 Rafidain made a total of 37 payments on the letters of credit at issue here. The first letter, issued in 1986, provided that payment would be made 360 days from the date of the bill of

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[1] Letters of credit are a mainstay of international commerce. "Merchants developed the letter of credit over seven hundred years ago to relieve the simple tension generated by a seller's hesitance to give up possession of his goods before he is paid and a buyer's wish to control the goods before parting with his money." *Confeccoes Texteis De Vouzela, LDA. v. Riggs Nat'l Bank*, 994 F.2d 851, 852 (D.C. Cir. 1993) (brackets and internal quotation omitted). In the ordinary course, the buyer of goods arranges with an "issuing bank"—here, Rafidain—to issue a letter of credit for the seller's benefit. "[A] [letter of] credit transaction deals in documents and is *wholly independent* of the underlying transaction in goods." *Id.* at 852 (emphasis added). Thus, letters of credit must be paid upon presentation of the requisite documentation, *regardless* of any other terms of the underlying contract, or any dispute about performance. *See generally* J. Dolan, The Law of Letters of Credit ¶ 3.07[4] (1991).

lading documenting the shipment of meat to Iraq. Rafidain made a number of payments on this letter, transferring dollars from its account at the Bank of New York in Manhattan to another New York bank account selected by Goodman. Although neither this nor subsequent letters *required* Rafidain to draw upon its New York bank accounts for payment, Rafidain admitted in its partial reply to Goodman's discovery requests that it did *in fact* make 25 of the 37 payments from such accounts. *Id.*, at 14a-15a, n.2.[2] Goodman contends—and the record contains no evidence to the contrary—that Rafidain also made the remaining 12 payments on the letters of credit from its accounts in New York. *Id.*[3]

After Iraqi forces invaded Kuwait in August 1990, Iraq ceased all payment on the letters of credit, leaving some $300 million due on the letters, despite Goodman's full compliance with the letters' terms. *Id.*, at 14a. Goodman subsequently filed suit in the United States District Court for the District of Columbia, seeking damages and declaratory relief. Rafidain defended by asserting that the court lacked jurisdiction under the FSIA. Goodman responded that Rafidain was not entitled to immunity under the FSIA's "commercial activity" exception, § 1605(a)(2).[4] Among other grounds, Goodman invoked the third clause of that exception, arguing that the

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[2] At Goodman's request, some of the payments were denominated in deutsche marks rather than U.S. dollars. Although Rafidain had initially objected to any use of a non-dollar currency, Goodman insisted on this protection against the ongoing decline in the dollar's value relative to European currencies.

[3] Prior to the transactions in this case, Rafidain had issued at least two other letters of credit to Goodman. Goodman contended below—and Rafidain has not disputed—that Rafidain *also* paid these earlier letters from its accounts in New York. *See, e.g.*, App. 27a n.17.

[4] Goodman did not, and does not, dispute that Rafidain qualifies as a "foreign state" within the meaning of the FSIA. *See* 28 U.S.C. § 1603(a), (b) ("[F]oreign state" includes certain "agenc[ies] or instrumentalit[ies] of a foreign state").

lawsuit was "based upon an act outside the territory of the United States"—Rafidain's breach of contract—that "cause[d] a *direct effect* in the United States"—the nonpayment of expected funds from bank accounts in New York. In December 1992, however, the District Court (Hogan, J.) granted Rafidain's motion to dismiss with prejudice, on the ground that the letters of credit did not *specifically designate* the United States as the place of payment. App. 27a-28a.[5]

Goodman appealed, but the Court of Appeals affirmed. 26 F.3d 1143 (D.C. Cir. 1994), App. 1a-9a. Rafidain's breach had no "direct effect in the United States," the Court asserted, because "[n]either New York nor any other United States location was designated as the place of performance where money was supposed to have been paid by Rafidain or to Goodman." App. 7a (internal quotations omitted). Thus, in the Court of Appeals' view, "Rafidain might well have paid [the letters of credit] from funds in the United States banks but it might just as well have done so from accounts located outside of the United States." *Id.* Because, in the Court's view, the absence of contractual designation undermined Goodman's claim as a matter of law, it affirmed the District Court's decision

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[5] Because the District Court placed dispositive weight on the fact that the letters of credit did not specifically require Rafidain to make payments from its accounts in New York, App. 27a-28a, the Court deemed the parties' past course of dealings in New York "insufficient to establish jurisdiction under the 'direct effects' clause," *id.*, at 28a. The Court did, however, note that

> Rafidain admits in response to plaintiffs' discovery requests that it made at least 25 out of 37 of the payments plaintiff received on the 14 letters of credit [81% of the dollar payments ($22,043,333.85) and 90% of the deutsche mark payments (DM 143,830,351.18)] from the United States. Def.['s] Reply Mem. at 1 n.1, 4, 10, 11, 12. Plaintiffs believe that most, if not all, of the remaining 12 payments also came from Rafidain's United States accounts and are prepared to prove this fact if Rafidain does not complete its admissions. Pls['] Suppl. Opp'n at 2 n.1.

App. 14a-15a n.2 (bracketed material in original).

to dismiss the suit despite Goodman's ongoing discovery into the actual locale of Rafidain's prior payments. Indeed, the Court incorrectly asserted that in the past Rafidain had "apparently" paid Goodman under the letters *outside* the United States. *Id.* n.3 (noting Rafidain's admission that 25 of the 37 payments had taken place *in* the United States).[6]

Judge Wald concurred, but stressed that she was "uncomfortable" with the majority's "reliance" on the contractual designation of a place of payment. *Id.*, at 9a. Regardless of the terms of the contract, she noted, a breach can have a "direct effect in the United States" if there is a "longstanding consistent customary practice" of payment in the United States. *Id.* She nonetheless concluded that dismissal in this case was proper based on the majority's assertion that "Goodman's complaint failed to allege such a longstanding and consistent practice." *Id.* (citing *id.* n.3).

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[6] The Court of Appeals also rejected Goodman's alternative theory that this lawsuit is "based upon commercial activity carried on *in* the United States," and therefore within the first of the three clauses of § 1605(a)(2). App 4a-6a. Whether a particular "commercial activity" takes place "in" or "outside" the United States, of course, depends on how broadly or narrowly such "activity" is defined. Most breach-of-contract cases, including this Court's recent decision in *Republic of Argentina v. Weltover, Inc.*, 112 S. Ct. 2160, 2164 (1992), assume that a foreign sovereign's breach takes place abroad, and therefore apply the more expansive third clause of § 1605(a)(2). *See also Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 241 (2d Cir. 1994); *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 581 (7th Cir.), *cert. denied*, 493 U.S. 937 (1989).

REASONS FOR GRANTING THE WRIT

The decision below is not only wrong, but exacerbates a circuit split on a commercially and legally significant question—whether a foreign sovereign is entitled to immunity when it breaches a contractual obligation long performed in the United States. By holding Iraq immune on the ground that it was not contractually *obligated* to pay Goodman in the United States, the Court of Appeals imposed an artificial and unwise limitation on the substantive scope of the FSIA. The court then compounded that error by imposing artificial and unwise procedural limitations on FSIA plaintiffs, effectively precluding them from satisfying the heightened substantive standard.

Those rulings, not surprisingly, conflict with other courts' interpretations of the Act. Unless checked, those conflicts result in disparate outcomes in the many FSIA cases raising these issues. This Court should resolve the confusion by granting *certiorari* and reversing the judgment below.

I. THE COURT OF APPEALS ERRED IN HOLDING THAT RAFIDAIN'S NONPAYMENT ON THE LETTERS OF CREDIT DID NOT HAVE A "DIRECT EFFECT IN THE UNITED STATES."

For most of this country's history, foreign states enjoyed absolute immunity from suit in United States courts. *See, e.g., Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562 (1926); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) (Marshall, C.J.). That sweeping immunity, extended under judicially-prescribed principles of comity, was grounded on the theory that the courts of one nation should not sit in judgment of the sovereign acts of another. *See, e.g., First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762-63 (1972); *Schooner Exchange*, 11 U.S. (7 Cranch) at 136, 146.

As foreign governments increased their involvement in commercial activity, however, extending absolute immunity became impractical. The State Department responded in 1952 by adopting a "restrictive" theory of foreign sovereign

immunity, whereby immunity would generally be limited to suits involving a foreign sovereign's *public* acts, but would not extend to suits involving its *commercial* activities. *See, e.g., Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487 (1983). The courts proceeded to implement that approach by calling for the State Department's advice on a case-by-case basis, but this *ad hoc* regime soon proved cumbersome and diplomatically awkward. *Id.* at 487-88.

Congress sought to rectify the situation in 1976 by enacting the FSIA, which codified the restrictive theory of foreign sovereign immunity. Under the Act, a foreign sovereign cannot be subjected to the jurisdiction of a United States court unless one of several specified exceptions applies. 28 U.S.C. § 1604. The most important of these—and the one relevant here—is the "commercial activity" exception, which abrogates foreign sovereign immunity where:

> the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes *a direct effect in the United States*. § 1605(a)(2) (emphasis added).

The purpose of this exception—indeed, "[t]he purpose of the FSIA"—"is to facilitate suits in United States courts arising from the commercial conduct of foreign sovereigns." *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 449 (6th Cir. 1988), *cert. dismissed*, 112 S. Ct. 1657 (1992) (internal quotation omitted). Under any of § 1605(a)(2)'s three clauses, a United States district court is vested with subject-matter jurisdiction over a foreign sovereign. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

By holding that a foreign sovereign's admitted failure to pay under a letter of credit cannot have a "direct effect in the United States" unless that letter requires payment in the United States, the D.C. Circuit erred as a matter of both law and logic.

Although the FSIA does not define "direct effect in the United States," that phrase has been the subject of considerable judicial interpretation, including this Court's opinion three Terms ago in *Republic of Argentina v. Weltover*, 112 S. Ct. 2160 (1992). That case arose out of a series of transactions involving the Argentine government's attempts to refinance its debts by issuing bonds that could be paid, at the creditors' election, in London, Frankfurt, Zurich, *or* New York. *Id.*, at 2164. When the bonds began to mature, Argentina announced that it was unable to pay and would unilaterally extend the repayment period. The creditors refused, insisting on prompt and full payment in New York. When Argentina still failed to pay, several non-American creditors brought suit in New York for breach of contract.

This Court rejected Argentina's claim of foreign sovereign immunity, concluding with "little difficulty" that Argentina's nonpayment of funds in New York qualified as a "direct effect" of its breach. *Id.*, at 2168. A breach of contract, the Court held, necessarily has a "direct effect" in the place of "ultimate contractual obligations"—and where the breach involves nonpayment, that effect is felt where the payment was to be made. *Id.* The "direct effect in the United States," of Argentina's breach, then, was straightforward: "Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming." *Id.*

But that is not all. The *Weltover* Court went on to emphasize that courts were not free to limit jurisdiction under the FSIA by engrafting additional "unexpressed" jurisdictional limitations onto the Act. The Court thus rejected the notion, which had gained wide currency among the courts of appeals, that in order to be "direct," the effects in the United States of a particular commercial activity abroad had to be both

"substantial" and "foreseeable." *Id.*, at 2168. The word "direct," the Court stressed, encompasses no such additional requirements. As the Court explained, "an effect is direct if it follows as an *immediate consequence of the defendant's activity*." *Id.* (emphasis added, internal quotations omitted).

This case is strikingly similar to *Weltover:* as a direct result of a foreign sovereign's breach of contract, financial activity that was supposed to take place in the United States did not.[7] In both cases, to be sure, such future financial transactions *might conceivably* have taken place entirely outside the United States, with money neither flowing into nor out of United States bank accounts. But some degree of uncertainty is inevitable in cases where the "commercial activity" at issue is not a foreign sovereign's *act*, but its *omission*—the nonpayment of funds under a contract. *See, e.g., Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 311, 312 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). Where something has *not happened*, it is always conceivable that it *might not have happened* as expected.

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[7] *Weltover* involved Argentina's failure to remit funds *into* accounts in the United States; this case involves Iraq's failure to remit funds *out of* such accounts, which already contained Iraq's money. The situations are thus mirror images, and both necessarily entail (in *Weltover*'s terms) "immediate consequence[s]" in the United States—New York bank accounts will hold either more or less money than anticipated. 112 S. Ct. at 2168 (internal quotation omitted). The D.C. Circuit did not purport to distinguish *Weltover* based on the *direction* of the money, but rather rested its holding on the absence of a contractual designation. *See* App. 7a ("Neither New York nor any other United States location was designated as the 'place of performance' where money was 'supposed' to have been paid *by Rafidain or to Goodman*.") (emphasis added). Indeed, other courts have made clear that the direction of the money is not significant. *See, e.g., Commercial Bank of Kuwait*, 15 F.3d at 241 (failure to pay funds *from* New York accounts creates "direct effect in the United States"). Here, moreover, Iraq's breach involves both its failure to pay money *from* New York bank accounts and its failure to pay money *into* New York bank accounts. *See supra* pp. 3-4.

Assessing the "effects" of an omission, then, is an inherently speculative venture, and nonpayment cases always involve a matter of degree: how likely is it that payment would been carried out through bank accounts in the United States? That likelihood may be greatest where a contract expressly requires that payment take place in the United States. But, as *Weltover* makes clear, such designation is not necessary. There, as here, *the contract did not require payment through accounts in the United States.* In both cases, nonetheless, it was reasonable to assume that future payments would be carried out through such accounts—in *Weltover* because Argentina had already paid interest on the bonds in New York and the creditors had expressly demanded payment there, 112 S. Ct. at 2168, and in this case because Rafidain had a history of paying Goodman from its New York bank accounts. In neither case can the possibility of payment through New York be deemed so "speculative" or "remote," *id.*, to defeat jurisdiction.[8]

The court below, however, made a crucial logical misstep—it assumed that the place of future performance under a contract is fatally speculative unless specifically designated in the contract. That assumption, ironically, the court based on speculation of its own: "Rafidain might well have paid [the letters of credit] from funds in the United States banks but it might just as well have done so from accounts located outside of the United States." App. at 7a. Because Rafidain was not *required* under the letters to pay Goodman from its accounts in the United States, in other words, one could not assume that it would in fact do so. That approach begs the question—one cannot assume, without more, that Rafidain would *not* pay

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[8] Indeed, in some respects the "direct effect in the United States" is more apparent here than in *Weltover*. There, after all, Argentina had not yet performed *any* of its "ultimate contractual obligations"—payment of principal under the bonds—in New York. Here, in contrast, Rafidain by its own admission had already established a pattern of performing its "ultimate contractual obligations"—payment under the letters of credit—through its New York accounts.

Goodman from its United States accounts any more than one could assume that it *would*. Where a contract is silent as to the method of payment, it does not necessarily follow that any method is just as likely as any other. Rather, under elementary legal principles, one must look *outside* the four corners of the contract to the parties' established course of dealing to determine their likely future course of dealing, including the source of future payment.[9]

Indeed, the "effects" of a contractual breach cannot logically be assessed *solely* by reference to the formal terms of a document. The law, after all, recognizes a fundamental distinction between intent and effect. *Cf. Washington v. Davis*, 426 U.S. 229, 240 (1976). A contract's terms may provide the best indication of its drafters' *intent*, but do not necessarily (or even typically) anticipate all its *effects*. And nonpayment under a letter of credit has *precisely the same* effects where money actually would have been paid, regardless of whether that place is specified in the letter. As an immediate consequence—and hence, under *Weltover*, a "direct effect"—of Rafidain's breach, its U.S. bank accounts retained large sums of money that otherwise would have been depleted to pay Goodman. Specifying those accounts in the letters of credit as the source of payment may be *sufficient* to establish a "direct effect," *see, e.g., Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 241 (2d Cir. 1994); *Siderman de Blake v. Argentina*, 965 F.2d 699, 710-11 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812

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[9] As this Court has explained, "[i]t is well settled that parties who contract on a subject-matter concerning which known usages prevail incorporate such usages by implication into their agreements, if nothing is said to the contrary." *Hostetter v. Park*, 137 U.S. 30, 40 (1890); *see also* 2 Restatement (Second) of Contracts § 223(2), p. 157-58 ("Unless otherwise agreed, a course of dealing between the parties gives meaning to or supplements or qualifies their agreement."); 3 A. Corbin, Contracts, § 558, p. 249 (rev. ed. 1960); 5 S. Williston, A Treatise on the Law of Contracts, §§ 648 *et seq.* (3d ed. 1961).

(1993), but surely is not *necessary*.[10] Indeed, it is the height of irony to determine a court's jurisdiction over a case involving a *breach* of contract by unswerving reference to the formal contractual terms and not the actual course of events.

What the court below has done, in effect, is to resurrect the distinct requirement of "foreseeability" freshly interred in *Weltover*. Because a breach may have effects that are "direct" even if unforeseen or unforeseeable, contractual designation is in no way the *sine qua non* of "direct effect." Indeed, in pre-*Weltover* cases imposing a separate requirement of foreseeability, most courts held that additional requirement *satisfied* where financial transactions in fact took place in the United States. *See, e.g., Meadows v. Dominican Republic*, 817 F.2d 517, 523 (9th Cir.), *cert. denied*, 484 U.S. 976 (1987); *Harris Corp. v. National Iranian Radio & Television*, 691 F.2d 1344, 1351 (11th Cir. 1982); *cf. Transamerican S.S. v. Somali Democratic Republic*, 767 F.2d 998, 1001-02 (D.C. Cir. 1985). *A fortiori*, jurisdiction must also obtain under these cases in light of *Weltover*'s "more lenient standard" for assessing "direct effect[s] in the United States." *Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines*, 965 F.2d 1375, 1387 (5th Cir. 1992).

The D.C. Circuit compounded its logical errors by assuming that because Rafidain *admitted* to having made only 25 of the 37 previous payments in the United States, it "apparently" made the other 12 payments elsewhere. App. 7a.[11] Based on that assumption, the court concluded that Rafidain

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[10] Indeed, specifying that payment will take place into or from United States bank accounts will not invariably *suffice* to establish an actual "direct effect"—if a contract designated a United States bank account but the foreign sovereign had long paid from funds located elsewhere, a "direct effect" of nonpayment would be felt at the *actual* expected source of the funds.

[11] *See also* App. 7a n.3 ("Rafidain's discovery admissions indicate that of the approximately $27,000,000 paid under the first letter, approximately $22,000,000 was paid from United States accounts.")

might in the future also pay Goodman "from accounts located outside of the United States." *Id.* But that simply does not follow. Goodman has argued that *all 37* payments under the letters of credit at issue here, as well as all payments under previous letters of credit between the parties, involved payment from Rafidain's accounts in the United States. *As the District Court observed, the record contains no evidence to the contrary*. App. 14a-15a n.2, 27a-28a. The location of the accounts from which Rafidain actually paid, of course, is a question of fact, and Goodman's interrogatories on this issue were outstanding when the District Court dismissed the action for lack of jurisdiction.

The D.C. Circuit imposed a Catch-22 by coupling its uniquely stringent *substantive* standard for establishing a "direct effect in the United States" with a uniquely stringent *procedural* standard for alleging and meeting that substantive standard. As the D.C. Circuit noted, Goodman's complaint alleged that " '[i]n the past, Rafidain has used [funds] on deposit at U.S. Banks to effect payment to plaintiff Goodman Holdings in the United States on one or more of the letters of credit in this action.' " App. 7a-8a n.3 (quoting Complaint ¶ 6, App. 32a-33a). That allegation more than suffices to assert a reasonable basis for jurisdiction under the FSIA, given the liberal "notice" pleading regime of the Federal Rules of Civil Procedure. *See, e.g., Conley v. Gibson*, 355 U.S. 41, 47-48 (1957). Even if Goodman's complaint were procedurally flawed, of course, the court ought to have remanded for amendment, not dismissed the case outright. *See, e.g., Brandon v. Holt*, 469 U.S. 464, 471 & n.19 (1985); *Foman v. Davis*, 371 U.S. 178, 182 (1962). That is precisely what other courts of appeals have done when faced with this situation in FSIA cases. *See, e.g., Siderman de Blake*, 965 F.2d at 711; *Gregorian v. Izvestia*, 871 F.2d 1515, 1527-28 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989).

To be sure, district courts enjoy broad discretion to oversee and limit discovery, particularly where potentially sensitive foreign-policy concerns are implicated. But here the

District Court *did not exercise any such discretion*—it denied Goodman further discovery based on the erroneous *legal* theory that a foreign sovereign's nonpayment under a contract cannot have a "direct effect" unless the contract specifies that payment will be carried out through accounts in the United States. App. 27a-28a & nn. 17, 18.[12] A district court, of course, necessarily abuses discretion that it fails to exercise because of an antecedent error of law. *See, e.g., Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990); *Hensley v. Eckerhart*, 461 U.S. 424, 438-39 (1983); *Boag v. MacDougall*, 454 U.S. 364, 365 n.* (1982) (*per curiam*); *cf. Prill v. NLRB*, 755 F.2d 941, 956-57 (D.C. Cir.), *cert. denied*, 474 U.S. 948 (1985).

Because the D.C. Circuit, like the District Court, insisted on contractual designation as a matter of law, it affirmed the District Court's discovery limitation based on the same legal error. *See* App. 8a ("[W]e do not see what facts additional discovery could produce that would affect our jurisdictional analysis above and therefore conclude the district court did not abuse its discretion in dismissing the action when it did.").

In any event, FSIA plaintiffs must be afforded a fair shot at discovering disputed facts critical to a colorable claim of jurisdiction. It makes no sense to reject a party's assertion of jurisdiction before affording that party an opportunity to discover the facts necessary to substantiate the claim. Thus, as other Courts of Appeals have emphasized, a party seeking to sue a foreign sovereign in an American court must be given "an ample opportunity to secure and present evidence relevant to the existence of jurisdiction." *Gould, Inc.*, 853 F.2d at 451-52 (internal quotation omitted); *see also Federal Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1284 n.11 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 2101 (1994); *Filus v. Lot Polish*

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[12] As noted above, *see supra* n. 5, the District Court acknowledged that Goodman had not had a full opportunity to establish its claim that all 37 pre-breach payments under the letters of credit took place in New York.

Airlines, 907 F.2d 1328, 1332-33 (2d Cir. 1990); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 448-49 (D.C. Cir. 1990); *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 800-01 (9th Cir. 1989).[13]

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[13] The opinion below, moreover, failed to apply established burden-shifting analysis in determining FSIA jurisdiction. Although the circuits differ in their formulation of the relevant test, they agree that a plaintiff does not bear the ultimate burden of proving that an exception *does* apply, but rather a foreign sovereign bears the ultimate burden of proving that an exception *does not* apply. *See, e.g., Federal Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1285 & n.13 (3d Cir. 1993); *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993); *Tubular Inspectors, Inc. v. Petroleos Mexicanos*, 977 F.2d 180, 184 n.11 (5th Cir. 1992); *United States v. Moats*, 961 F.2d 1198, 1205 (5th Cir. 1992); *Siderman de Blake v. Argentina*, 965 F.2d 699, 707-08 & n.9 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993); *Gerding v. Republic of France*, 943 F.2d 521, 525-26 (4th Cir. 1991), *cert. denied*, 113 S. Ct. 1812 (1993); *Brewer v. Socialist People's Republic of Iraq*, 890 F.2d 97, 100-01 (8th Cir. 1989); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451-52 (6th Cir. 1988), *cert. dismissed*, 112 S. Ct. 1657 (1992); *Meadows v. Dominican Republic*, 817 F.2d 517, 522-23 (9th Cir.), *cert. denied*, 484 U.S. 976 (1987); *cf. Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1171 (D.C. Cir. 1994) ("It is the burden of the foreign sovereign in each case to establish its immunity by demonstrating that none of the exceptions is applicable."). In the opinion below, the D.C. Circuit effectively saddled Goodman, not Rafidain, with the ultimate burden of proof on the jurisdictional question.

II. THE OPINION BELOW EXACERBATES A CIRCUIT SPLIT REGARDING THE SCOPE OF THE "DIRECT EFFECT" CLAUSE.

Although the FSIA has been part of the U.S. Code for less than two decades, it has spawned considerable discord and confusion among the lower courts. *See, e.g., Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 576 (7th Cir.) (characterizing FSIA as "remarkably obtuse, a statutory labyrinth with a bizarre structure and many deliberately vague provisions" that have led to "considerable confusion") (internal quotations and brackets omitted), *cert. denied*, 493 U.S. 937 (1989); *Callejo v. Bancomer*, 764 F.2d 1101, 1107 (5th Cir. 1985) (describing FSIA not only as "statutory labyrinth" but as "constant bane of the federal judiciary").

That confusion has been particularly acute with respect to the Act's "direct effect" clause. *See, e.g., United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1237 (10th Cir. 1994) (describing "direct effect" clause as "hopelessly ambiguous"); *Yugoexport, Inc. v. Thai Airways Int'l, Ltd.*, 749 F.2d 1373, 1375 (9th Cir. 1984) ("Courts of appeals have announced widely varying definitions of the scope of the 'direct effect' language of § 1605(a)(2)."), *cert. denied*, 471 U.S. 1101 (1985); *Texas Trading*, 647 F.2d at 311, 312 (characterizing "direct effect" clause as "somewhat abstruse" and noting that "locating the site of the injury, especially when the harm consists in an omission, is an enterprise fraught with artifice"). Although *Weltover* provided some guidance, circuit splits continue to flourish as some courts, like the one below, give *Weltover* an unreasonably parsimonious reading. Three years of post-*Weltover* percolation have failed to resolve the chronic lower-court confusion over the proper interpretation of the "direct effect" clause.

The most important of these splits involves the question whether a foreign sovereign's breach of contract has a "direct effect in the United States" where the foreign sovereign has *in*

fact begun to carry out its performance obligations in the United States, although not contractually bound to do so. The opinion below held that such a contractual designation was necessary to establish such a "direct effect," on the theory that otherwise the possibility of future payment in the United States would be too speculative to support jurisdiction. App. 7a. In support of its holding, the D.C. Circuit relied upon a pre-*Weltover* case, *International Housing Ltd. v. Rafidain Bank*, 893 F.2d 8, 11-12 (2d Cir. 1989), where the Second Circuit also held that a foreign sovereign's nonpayment could not have a "direct effect in the United States" where the contract did not require payment from United States accounts, even though past payments had in fact been made from such accounts. *Cf. Commercial Bank of Kuwait*, 15 F.3d at 241 (finding "direct effect in the United States" where Rafidain and other Iraqi banks failed "to remit funds in New York, as they were *contractually* bound to do") (emphasis added); *Antares Aircraft v. Federal Republic of Nigeria*, 999 F.2d 33, 36 (2d Cir. 1993) (*Antares II*) (asserting—mistakenly—that *Weltover* "found decisive the fact that *the contractually designated* place of performance was New York") (emphasis added), *cert. denied*, 114 S. Ct. 878 (1994); *Antares Aircraft v. Federal Republic of Nigeria*, 948 F.2d 90, 95 (2d Cir. 1991) (*Antares I*) (no "direct effect in the United States" where funds transferred from United States accounts to Nigeria), *vacated and remanded in light of Weltover*, 112 S. Ct. 3020 (1992), *on remand*, 999 F.2d 33 (2d Cir. 1993).

The Ninth Circuit, however, has held that a foreign sovereign's breach of contract can have a "direct effect in the United States" even if the contract does not specifically contemplate any transactions in the United States. *See, e.g., Meadows v. Dominican Republic*, 817 F.2d 517, 523 (9th Cir.), *cert. denied*, 484 U.S. 976 (1987). The contract in *Meadows*, as the district court there explained, "does not call for payment at a specified bank or other location in the United States." 628 F.Supp. 599, 604-05 (N.D. Cal. 1986). Nonetheless, as the

Ninth Circuit noted, the contract provided that the "transaction must be made through [the foreign sovereign's] bank ... and through [plaintiffs'] bank," and it was reasonable to assume that the plaintiffs, who resided in the United States, would demand payment there. 817 F.2d at 523 (internal quotations omitted). The key, as *Meadows* explained, was that the foreign sovereign "could *reasonably have expected* that payment would be called for at a bank in the United States," so "the effect of the foreign state's commercial activity was in the United States." *Id.* (emphasis added). *Weltover*, of course, only reinforces that conclusion, by holding that a "direct effect" need not *in addition* be "substantial" and "foreseeable."[14]

Meadows is far from unique; numerous other cases also emphasize that a contractual breach can have a "direct effect" in the United States where, in *Meadows*' terms, the parties "could *reasonably have expected* that payment would be called for at a bank in the United States," regardless of whether the contract specifically referred to the United States.[15] *See, e.g.*,

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[14] *Weltover* also makes clear that the plaintiffs' nationality in no way controls the "direct effect" inquiry. The Court specifically rejected Argentina's suggestion that "the 'direct effect' requirement cannot be satisfied where the plaintiffs are all foreign corporations with no other connections to the United States." 112 S. Ct. at 2168.

[15] Indeed, the opinion below effectively reads *Weltover* to cut back on prior D.C. Circuit precedent interpreting the "direct effect" clause. *See, e.g., Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 450-51 (D.C. Cir. 1990) (concluding that Iran's breach of contract had "direct effect in the United States" based on its extensive past contacts with American plaintiffs); *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1515 (D.C. Cir. 1988) (breach of contract has "direct effect" in United States where "something legally significant actually happened in the United States; *a bank refused to pay on a letter of credit*, money was transferred, a debt was incurred") (emphasis added); *cf. Transamerican S.S. v. Somali Democratic Republic*, 767 F.2d 998, 1001 (D.C. Cir. 1985) (foreign sovereign's seizure of American vessel overseas causing American corporate plaintiff to transfer money from its United States bank to the foreign sovereign's United States

(continued...)

America West Airlines, 877 F.2d at 799 (approvingly describing *Meadows* as standing for the proposition that a "direct effect in the United States" is established by "the *fact* of payment in the United States," regardless of the contract) (emphasis added); *Security Pac. Nat'l Bank v. Derderian*, 872 F.2d 821, 826 (9th Cir. 1989) ("Cases which have found a direct effect in the United States involve, among other things, *performance* in the United States of some part of a commercial agreement between the parties.") (emphasis added); *Harris Corp.*, 691 F.2d at 1351 (finding "direct effect" where "letter of credit arrangement ... extends into this country, and the appellants' demands thus have significant, foreseeable financial consequences here" by depleting funds in American bank); *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 820 n.13 (3d Cir. 1981) (finding "direct effect in the United States" where foreign seaman arrived in the United States without wages due to foreign sovereign's breach of employment contract); *Texas Trading & Milling Corp.*, 647 F.2d at 312, 304 (breach by foreign sovereign has "direct effect" in New York where plaintiffs were to "present documents and collect money in the United States, and the breaches precluded their doing so" although those actual payment arrangements "differed from those set forth in the ... contracts"). *See generally International Housing*, 893 F.2d at 13 (Kaufman, J., dissenting) (regardless of contractual designation, "nonpayment of a debt payable in the United States between foreigners causes a direct effect in the United States").

Even casual perusal of these cases reveals that their approach to the "direct effect" question is fundamentally at odds

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[15] (...continued)
bank caused "direct effect" in United States). Ironically, prior to *Weltover*, the D.C. Circuit was known for taking an *expansive* view of the "direct effect" clause as applied to financial ramifications in the United States of a foreign sovereign's actions. *See, e.g., Antares Aircraft v. Federal Republic of Nigeria*, 948 F.2d 90, 95-96 (2d Cir. 1991) (citing *Transamerican S.S. Corp.* with "but see" signal), *vacated*, 112 S. Ct. 3020 (1992), *on remand*, 999 F.2d 33 (2d Cir. 1993) *cert. denied*, 114 S. Ct. 878 (1994).

with the approach followed below. Whereas the D.C. Circuit required Goodman to establish a probability—indeed, a near certainty—that, but for the breach, payment would have been made into or from accounts in the United States, these other circuits simply require plaintiffs to show that future effects of a breach in the United States would not be "purely fortuitous." *See, e.g., Siderman de Blake*, 965 F.2d at 710-711; *America West Airlines*, 877 F.2d at 800; *Security Pac. Nat'l Bank*, 872 F.2d at 286; *Gould, Inc.*, 853 F.2d at 453; *Callejo*, 764 F.2d at 1111. Where, as here, a foreign sovereign has admitted to a course of *past* payment from accounts in the United States, the possibility of *future* payment from those accounts is obviously anything but "purely fortuitous."

The result in this case would have been different, then, had it arisen in a different circuit. By insisting on formal contractual designation and then imposing a heightened pleading standard, the D.C. Circuit has turned the FSIA on its head. The whole point of the statute, of course, is to *open* American courts to commercial disputes involving foreign sovereigns, *see, e.g., Verlinden*, 461 U.S. at 490, of which this case is a paradigm. The D.C. Circuit's mechanical and anti-textual approach to evaluating the "direct effects" of a foreign sovereign's contractual breach is a throwback to the pre-FSIA regime of absolute immunity.

The approach below is not only misguided as a matter of law, but unwise as a matter of policy. The availability of legal recourse is crucial to preserving the status of the United States—and particularly New York—as a preeminent financial center in the increasingly integrated global economy. "If individuals or corporate entities become wary of their ability to protect their rights in business transactions conducted in New York they will look elsewhere." *Weltover*, 941 F.2d 145, 153 (2d Cir. 1991), *aff'd*, 112 S. Ct. 2160 (1992). Iraq chose to conduct its business through the United States; that choice entails a concomitant recognition of American judicial jurisdiction over those commercial transactions.

Perhaps worst of all, the decision below exacerbates the persistent lower-court confusion over the scope of the "direct effect" clause. Parties to commercial transactions funded by foreign sovereigns from accounts in the United States must know whether or not U.S. courts are thereby vested with jurisdiction, and should not be condemned to wasteful litigation in this jurisdictional bog. The decision below, then, is not only wrong, but antithetical to the Act's central goal of promoting robust commerce and diplomatic harmony by ensuring certainty, predictability, and "uniformity of decision." *See, e.g., Security Pac. Nat'l Bank*, 872 F.2d at 284. Far from resolving the confusion, *Weltover* has only made it worse. This Court should finish now the task it undertook then, and illuminate this jurisprudentially murky but economically and diplomatically significant corner of the law.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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Dated: October 27, 1994

APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-7246
DC No. 91-CV-02530

Goodman Holdings;
Anglo Irish Beef Processors International,
Appellants,

v.

Rafidain Bank,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

Argued Februbary 1, 1994.
Decided June 24, 1994.
Suggestion for Rehearing In Banc
Denied Sept. 7, 1994.

Before: WALD, HENDERSON and RANDOLPH, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* HENDERSON.

Concurring opinion filed by *Circuit Judge* WALD.

KAREN LECRAFT HENDERSON, *Circuit Judge*:

Goodman Holdings and its subsidiary Anglo Irish Beef Processors International (Goodman), both Irish corporations, brought this action to recover payments due on letters of credit issued in their favor by Rafidain Bank (Rafidain) and Rasheed Bank (Rasheed), both of them branches of the Iraqi government. The district court dismissed the action for lack of subject-matter jurisdiction on the ground that Rafidain enjoys sovereign immunity from this suit under 28 U.S.C. § 1604. Goodman appeals the dismissal asserting, as it did below, that Rafidain is deprived of its immunity here under the "commercial activity" and "direct effect" exceptions to statutory sovereign immunity, as set out in 28 U.S.C. § 1605(a)(2). For the reasons set forth below, we conclude that Rafidain enjoys sovereign immunity and that the action was therefore properly dismissed.

The facts, as alleged by Goodman, are fairly simple. Between March 1986 and January 1990 Rafidain and Rasheed issued fourteen irrevocable letters of credit, redeemable in installments, to pay for meat purchased from and delivered by Goodman to three corporations owned by the Iraqi government. Between November 1987 and July 1990 thirteen installments were paid on the letters, mostly from accounts in United States banks. Since the Iraqi invasion of Kuwait in August 1990, however, no additional payments have been made and Goodman contends it is still owed $302,246,923 plus interest.

Goodman initially filed suit in England to recover the balance due on the letters but that action was stayed when Rafidain was subjected to involuntary liquidation in the English courts. Goodman then filed this action in October 1991. Rafidain moved to dismiss on three alternative grounds: lack of subject-matter jurisdiction, lack of personal jurisdiction and forum non conveniens. By memorandum and order filed December 16, 1992 the district court granted Rafidain's motion to dismiss for lack of subject-matter jurisdiction, concluding that Rafidain's sovereign immunity under 28 U.S.C. § 1604 is

unaffected by subsection 1605(a)(2)'s commercial activity and direct effect exceptions to that immunity. Goodman appeals the district court's dismissal on two grounds: (1) this action comes within each of the cited exceptions and (2) the district court erroneously deprived Goodman of discovery necessary to establish subject-matter jurisdiction. We reject both arguments.

First, we agree with the district court that, under the facts alleged, Rafidain as a branch of the Iraqi government enjoys statutory sovereign immunity from this action. The immunity statute provides foreign governments with blanket immunity from suit in United States courts, subject only to specific exceptions:

> **Immunity of a foreign state from jurisdiction**
>
> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1604. It is undisputed that Rafidain, as a branch of the Iraqi government, is a foreign state generally entitled to immunity under this section. Goodman contends, however, that this particular action comes within both the commercial activity and direct effect exceptions, set out in the first and third clauses of subsection 1605(a)(2). That subsection provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> . . . . . .
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection

> with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States; ....

28 U.S.C. § 1605(a)(2). We find neither the first nor the third clause applicable here.[1]

Goodman first invokes the commercial activity exception, asserting this action is "based upon a commercial activity carried on in the United States by the foreign state," namely Rafidain's deposit of substantial funds in United States banks and its use of some of those funds to make payments due under the letters of credit. We disagree.

The Supreme Court recently had occasion to interpret the commercial activity exception in *Saudi Arabia v. Nelson*, 113 S.Ct. 1471, 1477-78 (1993). In that case Scott Nelson and his wife, American citizens, brought a tort action against the Saudi Government, which had recruited and hired Scott in the United States to work in a Saudi hospital. The complaint alleged that Saudi authorities later falsely imprisoned and assaulted Scott in retaliation for reporting safety threats in the hospital. The Court determined that, although the recruitment and hiring, which took place in this country, "ed to the conduct that eventually injured the Nelsons, they are not the basis for the Nelsons' suit." *Id.* at 1478. Rather, the Court concluded, Saudi Arabia's "torts, and not the arguably commercial activities that preceded their commission, form the basis for the Nelsons' suit." *Id.* at 1478. In reaching its decision, the Court construed the phrase "based upon," as used in the commercial activity exception, very narrowly:

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[1] Goodman does not rely on and we therefore do not address the second clause of the subsection.

Although the Act contains no definition of the phrase "based upon," and the relatively sparse legislative history offers no assistance, guidance is hardly necessary. In denoting conduct that forms the "basis," or "foundation," for a claim, *see* Black's Law Dictionary 151 (6th ed. 1990) (defining "base"); Random House Dictionary 172 (2d ed. 1987) (same); Webster's Third New International Dictionary 180, 181 (1976) (defining "base" and "based"), the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case. *See Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1109 (CA5 1985) (focus should be on the "gravamen of the complaint"); *accord, Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 893 (CA7 1991) ("An action is based upon the elements that prove the claim, no more and no less"); *Millen Industries, Inc. v. Coordination Council for North American Affairs*, 272 U.S.App.D.C. 240, 246, 855 F.2d 879, 885 (1988).

What the natural meaning of the phrase "based upon" suggests, the context confirms.... Congress manifestly understood there to be a difference between a suit "based upon" commercial activity and one "based upon" acts performed "in connection with" such activity. The only reasonable reading of the former term calls for something more than a mere connection with, or relation to, commercial activity.

Saudi Arabia v. Nelson, 113 S.Ct. 1471, 1477-78 (1993).[2] Applying this construction here, we must reject Goodman's first jurisdictional argument. Goodman has at most established a "relationship" or "connection" between its claim and the domestic commercial activity alleged here—Rafidain's maintaining accounts in United States banks and paying Goodman from those accounts. Goodman has not shown, as the decision in Saudi Arabia requires, that the domestic commercial activity constitutes an "element[ ] of a claim that ... would entitle [Goodman] to relief under [its] theory of the case." As Goodman acknowledges, all it need prove to establish its claim is that Rafidain issued the letters of credit and dishonored a payment demand that conformed to the letters' requirements. *See* Brief for the Appellants at 7 n. 4; *see also* John F. Dolan, *The Law of Letters of Credit* ¶ 9.02[2], at 9-6 (2d ed. 1991) ("It is well settled that an issuer that dishonors a beneficiary's conforming presentation has breached the credit engagement and must respond in damages."). Thus, the domestic commercial banking activities Goodman cites are legally irrelevant to its right of recovery under the letters of credit and, under *Saudi Arabia*, cannot form the "basis" for Goodman's suit so as to trigger the commercial activity exception to sovereign immunity.

Goodman next contends its suit comes within the "direct effect" exception in subsection 1605(a)(2)'s third clause because "the action is based ... upon an act outside the territory of the United States in connection with a commercial activity of

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[2] This court had earlier similarly construed the phrase "based upon," as used in the second clause of § 1605(a)(2) which is not invoked here, to require that there be "a direct causal connection" between the domestic act and the foreign commercial activity or that the domestic act be "an element of the cause of action under whatever law governs his claims." *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1027 n. 22 (D.C.Cir.1982) (citing *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 820 (3d Cir.1981), *cert. dismissed*, 455 U.S. 929, 102 S.Ct. 1297, 71 L.Ed.2d 474 (1982), and *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 272-73 (3d Cir.1980)).

the foreign state elsewhere and that act causes a direct effect in the United States." While this argument presents a closer case, we conclude that it too must fail.

In *Republic of Argentina v. Weltover, Inc.*, 112 S.Ct. 2160 (1992), the Supreme Court considered the meaning of the phrase "direct effect" and defined it succinctly but clearly: "[A]n effect is "direct" if it follows 'as an immediate consequence of the defendant's ... activity.'" *Id.* at 2168 (quoting *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 152 (2d Cir.1991)) (ellipsis by Court). Applying this construction, the Court then held that Argentina's rescheduling of the payment dates for certain of its bonds caused a direct effect in the United States so as to come within the exception where the bond payees "had designated their accounts in New York as the place of payment, and Argentina made some interest payments into those accounts before announcing that it was rescheduling the payments." *Id.* at 2168. The Court reasoned: "Because New York was thus the place of performance for Argentina's ultimate contractual obligations, the rescheduling of those obligations necessarily had a 'direct effect' in the United States: Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming." *Id.* The situation here is quite different. There has been no "immediate consequence" in the United States of Rafidain's failure to honor the letters. Neither New York nor any other United States location was designated as the "place of performance" where money was "supposed" to have been paid by Rafidain or to Goodman. Rafidain might well have paid them from funds in United States banks but it might just as well have done so from accounts located outside of the United States, as it had apparently done before.[3] Thus, Rafidain does

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[3] For example, Rafidain's discovery admissions indicate that of the approximately $27,000,000 paid under the first letter, approximately $22,000,000 was paid from United States accounts. *See* Appendix at 37-41.

(continued...)

not lose its immunity under the direct effect exception. *Cf. International Hous. Ltd. v. Rafidain Bank Iraq*, 893 F.2d 8, 12 (2d Cir.1989) (payment on overdraft guaranties to Rafidain's New York bank account, at Rafidain's request, was not "direct effect" in United States because "[t]he benefit to Rafidain from such payments was at its situs in Iraq," "payment in New York City was not a contractual requirement" and New York bank's role "was that of a passive conduit indifferent to the nature or terms of the underlying transaction").

Finally, Goodman asserts that dismissal of the action was "premature" because many of its jurisdictional discovery requests of Rafidain and others remained unanswered at the time of dismissal. The Federal Rules of Civil Procedure generally provide for liberal discovery to establish jurisdictional facts. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 & n. 13 (1978); *Crane v. Carr*, 814 F.2d 758, 760 (D.C.Cir.1987); *Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 788 (D.C.Cir.1983). Nevertheless, the scope of discovery lies within the district court's discretion. *Naartex*, 722 F.2d at 788. Under the circumstances, we do not see what facts additional discovery could produce that would affect our jurisdictional analysis above and therefore conclude the district court did not abuse its discretion in dismissing the action when it did.

For the preceding reasons, the district court's dismissal for lack of subject-matter jurisdiction is

Affirmed.

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[3] (...continued)
Goodman's complaint alleges only that "[i]n the past, Rafidain has used [funds] on deposit at U.S. Banks to effect payment to plaintiff Goodman Holdings in the United States on one or more of the letters of credit at issue in this action." Complaint ¶ 6.

WALD, Circuit Judge, concurring:

My colleagues base their finding that Rafidain's failure to honor Goodman's letters of credit had no "direct effect" in the United States in part on the fact that "[n]either New York nor any other United States location was designated as the 'place of performance' where money was 'supposed' to have been paid by Rafidain or Goodman." *Majority Opinion* ("*Maj.Op.*") at 1146. I write separately to emphasize that, for an act to have a "direct effect" in the United States, there is no prerequisite that the United States be contractually designated as the place of performance. If, for example, the letters of credit had specified that money must be funnelled to Ireland through the United States, a breach of the letters of credit would have had an "immediate consequence" in the United States: money that would have been transferred to Ireland would have remained in New York accounts. *Cf. Republic of Argentina v. Weltover*, 112 S.Ct. 2160, 2168 (1992) (finding direct effect where "money that was supposed to have been delivered to a New York bank for deposit was not forthcoming"). Moreover, even absent a contractual provision mandating the involvement of U.S. banks, if the longstanding consistent customary practice between Rafidain and Goodman had been for Rafidain to pay Goodman from its New York accounts, the breach of the letters of credit might well have had a direct and immediate consequence in the United States. As the majority points out, *see Maj.Op.* at 1147 n. 3, however, Goodman's complaint failed to allege such a longstanding and consistent practice; the complaint claims only that "[i]n the past, Rafidain has used ... funds on deposit at U.S. banks to effect payment to plaintiff Goodman Holdings in the United States on one or more of the letters of credit at issue in this action." Complaint ¶ 6. Thus I agree with my colleagues that in this case there was no direct effect in the United States within the meaning of 28 U.S.C. § 1605(a)(2), but I am uncomfortable with the reliance in their rationale on the lack of New York as a *contractually designated place of performance*.

APPENDIX B

[Filed September 7, 1994]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-7246
DC No. 91-CV-02530

Goodman Holdings;
Anglo Irish Beef Processors International,
Appellants,

v.

Rafidain Bank,
Appellee.

Before: WALD, HENDERSON and RANDOLPH, Circuit Judges.

ORDER

Upon consideration of appellants' petition for rehearing, filed July 25, 1994, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK
BY: /s/
Robert A. Bonner
Deputy Clerk

APPENDIX C

[Filed September 7, 1994]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-7246
DC No. 91-CV-02530

Goodman Holdings;
Anglo Irish Beef Processors International,
Appellants,

v.

Rafidain Bank,
Appellee.

Before: MIKVA, Chief Judge; WALD, EDWARDS, SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH and ROGERS, Circuit Judges

ORDER

Appellants' Suggestion For Rehearing *In Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *in banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK
BY: /s/_____
Robert A. Bonner
Deputy Clerk

APPENDIX D

[Filed December 18, 1992]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

D.C. No. CV 91-2530 TFH

Goodman Holdings and
Anglo Irish Beef Processors International
Plaintiffs-Appellees,
v.
Rafidain Bank
Defendant-Appellant.

MEMORANDUM OPINION

This matter comes before the Court on defendant Rafidain Bank's motion to dismiss. Defendant moves to dismiss the action for lack of subject matter jurisdiction and lack of personal jurisdiction or, in the alternative, in deference to pending proceedings in England and on *forum non conveniens* grounds. Having considered the arguments and authorities presented by counsel in their briefs and during oral argument, and for the reasons stated in this Memorandum Opinion, the Court grants defendant's motion and dismisses the case with prejudice.

I. BACKGROUND

Plaintiffs in this action, Goodman Holdings and its subsidiary, Anglo Irish Beef Processors International, are Irish corporations. Their claims arise out of fourteen letters of credit issued by Rafidain Bank and its related entities between March

1986 and January 1989.[1] These letters of credit were issued as payment for purchases of various meat products by three corporations owned by the Government of Iraq. Subsequently, and prior to Iraq's invasion of Kuwait, plaintiffs shipped all of the meat products to Iraq and submitted the documentation entitling them to receive payment under the letters of credit.

Plaintiffs allege that Rafidain and its related entities made thirty-seven payments on these letters of credit to plaintiffs between November 1987 and July 1990. At the time of the Iraqi invasion, Rafidain was late on a number of installment payments, and since August 1990, Rafidain has not made any payments to plaintiffs. As of March 1991, all of Rafidain's and Rasheed's obligations had come due. Collectively, defendants owe plaintiffs approximately $302,246,923 principal plus interest.

Plaintiffs assert that under the FSIA this Court has the power to exercise jurisdiction over Rafidain because the present action arises "out of the commercial activities of agencies or instrumentalities of the government of Iraq carried on in the United States and/or causing substantial foreseeable and direct effects in the United States." Compl. ¶ 1. Specifically, plaintiffs allege that Rafidain has been doing business in the United States through its agents and activities here and has substantial assets in the United States. Compl. ¶ 6. Plaintiffs claim that Rafidain has at least $135.84 million on deposit in United States banks, of which $16.81 million is designated "operating funds" and $119.03 million is designated "deposits to cover credits." *Id.* Plaintiffs allege that Rafidain used these funds to effect payment to plaintiff Goodman Holdings in the United States on one or more of the letters of credit at issue in this action.[2] *Id.*

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[1] Eleven of these letters of credit were issued by Rafidain Bank. The other three were issued by Rasheed Bank.

[2] Rafidain admits in response to plaintiffs' discovery requests that it made

(continued...)

Plaintiffs further allege that Rafidain Bank is related to Rasheed Bank[3] and the Central Bank of Iraq, entities that also have been doing business in the United States through their agents and instrumentalities and maintain substantial assets in the United States. At least with respect to the letters of credit at issue, plaintiffs claim that Rafidain, Rasheed and the Central Bank of Iraq are alter egos of one another. Compl. ¶ 14. Plaintiffs maintain that Rasheed has $305.77 million on deposit in United States banks, while the Central Bank of Iraq has $973.25 million on deposit in United States banks. Compl. ¶ 9, ¶ 13. Plaintiffs also allege that Rasheed held meetings with officials of the United States Department of Treasury in June 1990, in preparation for the official opening of a branch in New York City. Compl. ¶ 10. Additionally, plaintiffs claim that Rafidain and Rasheed have been conducting their business in the United States through correspondent accounts and relationships with a number of major United States banks.[4] Compl. ¶ 11.

Plaintiffs first asserted these claims in an action commenced in England, but the English court stayed plaintiffs' action when involuntary liquidation proceedings began against

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[2] (...continued)
at least 25 out of 37 of the payments plaintiff received on the 14 letters of credit [81% of the dollar payments ($22,043,333.85) and 90% of the deutsche mark payments (DM 143,830,351.18)] from the United States. Def.['] Reply Mem. at 1 n.1, 4, 10, 11, 12. Plaintiffs believe that most, if not all, of the remaining 12 payments also came from Rafidain's United States accounts and are prepared to prove this fact if Rafidain does not complete its admissions. Pls['] Suppl. Opp'n at 2 n.1.

[3] Plaintiffs assert that Rasheed is the former Number 106 branch of Rafidain and was originally formed to replace Rafidain as Iraq's international bank for commercial operations. Compl. ¶ 8.

[4] The United States banks include the Bank of New York (formerly Irving Trust Co.), Chase Manhattan Corp., BankAmerica Corp., Chemical Banking Corp., Citicorp, Continental Bank Corp., Manufacturer's Hanover Corp., and J.P. Morgan & Co.

Rafidain in England. On October 9, 1991, plaintiffs instituted the present action in this Court.

II. DISCUSSION

A. Legal Standard

Defendant moves to dismiss this action for lack of subject matter jurisdiction and lack of personal jurisdiction or, in the alternative, in deference to pending proceedings in England and on *forum non conveniens* grounds. In its motion to dismiss, defendant Rafidain advances a "facial challenge." For this type of jurisdictional challenge, the Court must accept as true all the allegations in plaintiffs' Complaint. *See, e.g., Herbert v. National Academy of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992); *Cardio-Medical Assoc., Ltd. v. Crozer-Chester Medical Ctr.*, 721 F.2d 68, 75 (3d Cir. 1983).

B. Subject Matter Jurisdiction under the Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-11 (1976), provides the "sole basis" for obtaining jurisdiction over a foreign sovereign in the United States. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-39 (1989). The Act permits "a foreign plaintiff to sue a foreign sovereign in courts of the United States, provided the substantive requirements of the Act are satisfied." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489 (1983). Under the FSIA, a foreign state[5] shall be immune from the jurisdiction of the courts of the United States and of the States "unless one of several statutory defined exceptions applies." The exception at issue in the present case

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[5] The parties do not dispute that Rafidain is a "foreign state" within the meaning of the FSIA. *See* 28 U.S.C. § 1603(a),(b) ("[F]oreign state" includes certain "agenc[ies] or instrumentalit[ies] of a foreign state.")

is § 1605(a)(2), the "commercial activity" exception. Section 1605(a)(2) provides that a foreign state is not immune from suit in any case

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. § 1605(a)(2).

The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). This definition "authorize[s] courts to case the net wide, and to identify a broad series of acts as the relevant set of activities." *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). Consistent with the restrictive view of sovereign immunity codified in the FSIA, an activity is commercial if it "is of a type that a private person would customarily engage in for profit," *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1107 (5th Cir. 1985), without regard to its ultimate purpose. 28 U.S.C. § 1603(d); *Republic of Argentina v. Weltover*, 112 S. Ct. 2160, 2166 (1992). Additionally, the commercial activity need only take place in part in the United States. *See* H.R. Rep. No. 1487 at 17, 94th Cong., 2d Sess. 16 (1976). Rafidain's activities relating to the letters of credit at issue clearly qualify as "commercial activities" under the FSIA.

Plaintiffs claim that the facts alleged in the Complaint are sufficient to establish jurisdiction under the FSIA on three different grounds: (1) plaintiffs' "action is based on commercial activity carried on [by Rafidain Bank and related entities] in the United States," as provided by the first clause of § 1605(a)(2); (2) defendant's acts outside the United States were connected

with the commercial activity of Rafidain elsewhere and "cause[d] a direct effect in the U.S.," as provided by the third clause of § 1605(a)(2); (3) the President's freeze of Iraq's assets in the United States suspended any sovereign immunity that Rafidain might have otherwise been able to assert. The Court shall address each of plaintiffs' claims in turn.

1. Commercial Activity in the United States

To establish jurisdiction under the first clause of § 1605(a)(2), plaintiffs must demonstrate that there is a close connection between the cause of action they assert and the jurisdictional facts upon which it is based. Specifically, plaintiffs must show that Rafidain's commercial activity has "substantial contact[s]"[6] with the United States and must prove that this cause of action is "based upon" that commercial activity. *See Stena Rederi AB v. Comision De Contratos del Comite*, 923 F.2d 380, 387 (5th Cir. 1991); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450, 452 (6th Cir. 1988); *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1379 (5th Cir. 1980). This Circuit has stated that § 1605's "based upon" standard is satisfied if the commercial activity in the United States constitutes or directly causes the occurrence of an element of the cause of action.[7] *See Gilson v. Republic of Ireland*, 682 F.2d 1022, 1027 n.22 (D.C. Cir. 1982).

Plaintiffs contend that Rafidain has carried on a "pattern" or "course of commercial conduct" in the United

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[6] Section 1603(e) of the FSIA defines a "commercial activity carried on in the United States by the foreign state" as commercial activity carried on by such a state and having substantial contact with the United States.

[7] "Although the court made this statement in the context of interpreting the second, rather than the first, clause of section 1605(a)(2), its sweep has led at least one court to hold that the *Gibson* court's definition of 'based upon' applies to all three clauses of § 1605(a)(2)." *See Vendcedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 200 (5th Cir. 1984) (citation omitted) (discussing different approaches to the "based upon" requirement).

States and assert that a whole series of transactions reveal that Rafidain, and its related entities, have systematically used banking facilities in the United States as a primary means of conducting commercial business. Plaintiffs assert that Rafidain had, as of March 31, 1990, at least $135 million and its related entities had at least another $1.28 billion on deposit in United States banks. Plaintiffs contend that Rafidain deposited and/or withdrew from these accounts daily. Plaintiffs also claim that Rafidain negotiated and obtained large credit facilities from banks in the United States and other United States agencies to purchase goods to import to Iraq.

Although these jurisdictional facts may be sufficient to establish that Rafidain is "present" or "doing business" in the United States, they do not compel a finding of jurisdiction under the first clause of § 1605(a)(2). There is no dispute that Rafidain and its related entities kept large sums of money on deposit in various United States banks. However, the crucial question under the first clause of § 1605(a)(2) is whether plaintiffs have alleged a sufficient nexus between Rafidain's course of commercial activity in the United States and the letters of credit at issue. Plaintiffs allege the following "connections" between the fourteen letters of credit at issue and Rafidain's "pattern" or "course of conduct" in the United States: (1) Rafidain completed performance on many of the payments in the United States by transferring funds for plaintiffs' benefit to United States accounts; (2) Rafidain used extensive United States commercial activities to raise capital and hard currencies to fund it purchases from plaintiff and to provide financial backing for its letters of credit; (3) Rafidain used its United States banking facilities to pay virtually all of the $27,086,044.94 and DM 159, 876, 372.42 of the payments on the letters of credit Rafidain made before its breach.

The Court finds that plaintiffs alleged "connections" do not constitute a sufficient nexus between Rafidain's course of commercial activity in the United States and the letters of credit at issue. The majority of the contacts between Rafidain and the

United States are unrelated to this cause of action. Although plaintiffs allege that Rafidain completed performance on many of the payments in the United States by transferring funds for plaintiffs' benefit to United States accounts, performance on these letters of credit occurred outside the United States, where the plaintiffs collected payment. The advising bank located in the United States merely accepted payment from Rafidain on plaintiffs' behalf. Although Rafidain may have used extensive United States commercial activities to raise capital and hard currencies to fund its purchases from plaintiff and to provide financial banking for its letters of credit, such activity is to a attenuated to the letters of credit at issue to establish jurisdiction under § 1605(a)(2). The only "connection" between Rafidain's issuance of the fourteen letters of credit at issue and the United States is that Rafidain chose to effect payment on some or all of the fourteen letters of credit with funds from its United States correspondent bank accounts. This alone does not meet the jurisdictional requirements of § 1605(a)(2). Accordingly, the Court finds that it lacks jurisdiction over Rafidain under the first clause of § 1605(a)(2).

2. Direct Effect in the United States

In the alternative, plaintiffs argue that various activities of Rafidain caused a "direct effect" in the United States, as provided by the third clause of the § 1605(a)(2). Specifically, plaintiffs allege that (1) Rafidain's failure to effect payment to plaintiffs in New York caused a "direct effect" in the United States; (2) Rafidain's failure to pay its international letters of credit from funds on deposit in New York banks caused a "direct effect" in the United States because money that routinely was transferred out of United States accounts remained in these accounts (3) Rafidain's payment of, and its latter failure to pay, the installments due on the letters of credit caused a "direct effect" in the United States because it affected other creditors of Rafidain, including at least one of Goodman Holdings' creditors that Goodman Holdings could not afford to pay.

The principal decision addressing the "direct effects" clause of § 1605(a)(2) is a recent Supreme Court case, *Republic of Argentina v. Weltover, Inc.*, 112 S. Ct. 2160 (1992). In *Weltover*, two Panamanian corporations and a Swiss bank brought a breach of contract action against the Republic of Argentina and its central bank (collectively "Argentina") after Argentina unilaterally extended the time for payment on bonds it had issued as part of a currency stability plan. The plaintiff bondholders had designated their accounts in New York as the place of payment, and Argentina had made some interest payments into those accounts before it announced that it was rescheduling the payments. A unanimous Supreme Court held

> Because New York was thus the place of performance for Argentina's ultimate contractual obligations, the rescheduling of those obligations necessarily had a "direct effect" in the United States: Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming.

112 S. Ct. at 2168.

The *Weltover* Court defined a "direct effect" as any effect that "follows 'as an immediate consequence of defendant's . . . activity.'" 112 S. Ct. at 2168. Prior to *Weltover*, this Circuit and other circuits had imposed a more stringent standard, requiring a foreign state's conduct to be "substantial" and "direct and foreseeable" to support jurisdiction under the FSIA. *See, e.g., Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1514 (D.C. Cir. 1988). *Weltover* expressly rejected these requirements. 112 S. Ct. at 2168.

Plaintiffs assert that the commercial activities found to amount to a "direct effect" in *Weltover* are virtually identical to those in the present case. In both cases, money which would have been transferred in the United States was not transferred. *See Callejo v. Bancomer, S.A.*, 764 F.2d at 1111 (*citing Harris Corp. v. Nat'l Iranian Radio & Television*, 691 F.2d 1344

(11th Cir. 1982) (payment of a letter of credit from a United States bank has a direct effect "since it causes a depletion of funds in the American bank")). Plaintiffs argue that *Weltover's* express rejection of a "foreseeability" requirement forecloses defendant's argument that *Weltover* only applies where the United States is the required and final place of payment.

To support its argument that the nonpayment of the letters of credit at issue did not cause a "direct effect" in the United States, defendant relies primarily on *International Housing, Ltd. v. Rafidain Bank Iraq*, 893 F.2d 8 (2d Cir. 1989). Although *International Housing* is a pre-*Weltover* decision, the Court finds the Second Circuit's reasoning consistent with *Weltover*. The Court analyzes the decision in some detail because it finds *International Housing* most relevant to the instant case, particularly since it involves the same defendant.[8]

In *International Housing, Ltd v. Rafidain Bank Iraq*, International Housing, Ltd. ("IHL"), a Bahamian company, contracted with Iraq to construct 740 housing units in Iraq. The housing contract between Iraq and IHL did not provide for payment or any other activity in the United States. However, the IHL officer who signed the contract was a United States citizen who worked in an IHL office in Connecticut, and IHL used American-made materials and American personnel on the project. Pursuant to the contract, Iraq used Rafidain as its commercial bank, while IHL used the Royal Bank of Canada. Rafidain did not maintain a branch or office of any sort in the United States, and was not licensed to do business in the United States. Rafidain did, however, maintain a "correspondent" bank

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[8] Although plaintiffs have cited a number of cases where United States courts have exercised jurisdiction over Rafidain, these cases are factually distinguishable from the present case. Some of these cases involve contracts which have definite links to the United States, while others involve United States plaintiffs. *See, e.g., First City, Texas-Houston, N.A. v. Rafidain Bank & Central Bank of Iraq*, No. 90-7360 Mem. Order (S.D.N.Y., Sept. 25, 1992).

account with the Irving Trust Company in New York City. Rafidain secured an advance payment IHL and issued a guarantee and an "overdraft facility" credit for IHL's performance. IHL obtained corresponding counter-guarantees from Royal bank and agreed to indemnify Royal Bank for any payments it might have to make on these counter-guarantees.

The suit arose when IHL claimed that Iraq breached the housing construction contract, thereby forcing IHL to utilize Rafidain's overdraft credit. IHL sued Rafidain and Royal Bank in the Bahamas to stop payment on the overdraft guarantees,[9] and after obtaining a default judgment against Rafidain, attempted to enforce it in the United States. The district court held that "Rafidain's acts of demanding payment in New York and the receipt of such payment in New York provide[d] a sufficient nexus with the United States to support subject matter jurisdiction over [the] transaction." *See International Housing, Ltd. v. Rafidain Bank Iraq*, 712 F. Supp. 1112, 1117 (S.D.N.Y. 1989). However, the district court dismissed the action for lack of personal jurisdiction. *Id.* at 1120. On appeal, Judge Winter, writing for the Second Circuit, held that the district court had neither personal nor subject matter jurisdiction over Rafidain. 893 F.2d at 10. The Second Circuit concluded that neither the financial losses to IHL, nor Royal Bank's payment of the overdraft guarantees into Rafidain's Irving Trust account at Rafidain's specific instructions, caused a sufficient "direct effect" in the United States to support jurisdiction.[10] *Id.* at 10-12.

With respect to the financial losses incurred by IHL, the Second Circuit relied upon the fact that IHL was a foreign

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[9] IHL initial brought suit in the New York Supreme Court against Rafidain and Royal Bank to enjoin payment by Royal Bank on the guarantees. This suit was dismissed on *forum non conveniens* grounds.

[10] The court did not address the question of whether payment to a United States branch office of a foreign sovereign caused a direct effect in the United States because the issue was not before the court. 893 F.2d at 12 n.4.

corporation and on the fact that the various contracts did not provide for payment in the United States to conclude that IHL had not suffered direct financial loss in the United States. Although some or all of IHL's principals or officers were United States citizens, the court found the use of the American personnel and equipment in Iraq "so incidental to the interests of the United States as to be irrelevant." *Id.* at 11.

With respect to Royal Bank's payment of the overdraft guarantees into Rafidain's Irving Trust account at Rafidain's specific instructions, the Second Circuit found that the benefit to Rafidain occurred at its situs in Iraq. The court again noted that payment in New York was not a contractual requirement under the guarantees and stated:

> [b]y directing payment into the Irving account, Rafidain availed itself of the protection only of the usual banking laws, but not of any United States law relevant to its contract with IHL or to its allegedly fraudulent and untimely demands upon Royal Bank. Irving Trust's role, moreover, was that of a passive conduit indifferent to the nature or terms of the underlying transaction.

Id. at 12.

The *International Housing* court distinguished the case from *Texas-Trading*, 647 F.2d 300, an earlier Second Circuit case where the court had found that a foreign sovereign's commercial activities had caused a "direct effect" in the United States. In *Texas-Trading*, New York corporations had sustained losses when the government of Nigeria prevented Morgan Guaranty Trust Company from making payments due and payable in New York City under a contract between Nigeria and the corporations. Unlike *International Housing*, both the financial loss and the breach had occurred in the United States. Moreover, Morgan Guaranty Trust played an active role as intermediary between Nigeria and the New York corporations,

whereas, in *International Housing*, Irving Trust merely recorded a deposit in Rafidain's account.[11]

Plaintiffs present two main arguments in response to defendant's reliance on *International Housing*. First, plaintiffs argue that "the legal standards applied in that case have since been overthrown by the Supreme Court's intervening decision in *Republic of Argentina v. Weltover*."[12] Pls.['] Opp'n at 4. Plaintiffs assert that "arcane doctrines regarding place of payment are largely irrelevant." *Callejo v. Bancomer, S.A.*, 764 F.2d at 1112. Second, plaintiffs argue that *International Housing* is factually distinguishable from the present case in that it involved a one-time transaction that occurred during 1975-80, a period when the United State and Iraq did not maintain diplomatic relations and had minimal contacts with one another. Additionally, plaintiffs claim that the procedural posture of the case, a belated challenge to a default judgment, prevented any further factual development of the plaintiff's jurisdictional claims.

As stated above, the Court does not find any conflict between the Supreme Court's decision in *Weltover* and *International Housing* for the following reasons. First, the *International Housing* court did not adopt the view which was prevalent in other circuits at the time—that the direct effect had to be both "substantial" and "foreseeable."[13] Most importantly,

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[11] Although Morgan Guaranty was not directly liable to the New York corporations, it was obligated by Nigeria to examine the requisite documentation before paying, and, after receiving instructions from Nigeria, not to pay even if the proper documents were presented.

[12] In support of this argument, plaintiffs cite Gary B. Born & David Westin, *International Civil Litigation in United States Court* 498 (1992).

[13] Defendant argues that its alleged nonpayment of the letters of credit at issue did not cause (1) a "substantial impact" in the United States that was "directly foreseeable" or (2) an "immediate consequence" in the United States. Given that *Weltover* clearly rejects the more stringent "substantial" and

(continued...)

for purposes of this opinion, in deciding whether to exercise jurisdiction under the "direct effects" clause of § 1605(a)(2), the *International Housing* court, like the *Weltover* Court, emphasized the significance of designating United States accounts as the principal place of payment. If *Weltover* casts any doubt on *International Housing*, it is limited to the portion of the *International Housing* opinion which suggests that application of the FSIA should depend on the citizenship of the parties,[14] rather than to that portion which addresses the significance of designating United States accounts as the principal place of payment.[15] The *Weltover* Court rejected argument that the "direct effects" requirement cannot be satisfied where plaintiffs are all foreign corporations with no other connections to United States. 112 S. Ct. at 2168-69. However, the *Weltover* Court expressly based its holding that Argentina's commercial activities had a "direct effect" in the United States on the fact that New York was the designated place of payment under the contracts.[16] *Id.* at 2168.

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[13] (...continued)
"foreseeable" standard previously applied by this Circuit, the Court restricts its analysis to whether defendant's nonpayment caused an "immediate consequence" in the United States.

[14] The *International Housing* court stated, "that IHL is a foreign corporation is relevant to whether the financial losses to IHL constituted a 'direct effect' in the United States." 893 F.2d at 11.

[15] This conclusion is consistent with Born & Westin's interpretation. Born & Westin state that *International Housing* may not survive *Weltover*. *See* Born & Westin, *supra* n.12 at 498. Later, they explain that "[t]he *Weltover* Court relied on the fact that the plaintiff Bonod-holders 'had designated their accounts in New York as the place of payment, and Argentina made some interest payments into those accounts. . . .' The Court specifically rejected the argument that, as *non-U.S. companies*, plaintiffs did not suffer a direct effect in the United States. *Compare supra* p. 498 [citing *International Housing*]." *Id.* at 509 (emphasis added).

[16] For several reasons, the Court accords little weight to plaintiffs' quote from *Callejo* that "arcane doctrines regarding place of payment are largely
(continued...)

Although the facts of *International Housing* are somewhat distinct from the present case, these differences do not alter this Court's conclusion that defendant's commercial activities do not quality as "direct effects" under the *Weltover* standard. In *Weltover*, Argentina's Central Bank previously made payments to the plaintiffs in the United States, as plaintiffs allege Rafidain Bank did in this case. However, unlike the present case, in *Weltover*, payment into United States accounts was a contractual requirement. Although the original debt instruments in *Weltover* did not require payment to be made in the United States, the plaintiff bondholders elected the United States as the place of payment, and the Court based its holding on this fact.

In this case, the Court cannot conclude under *Weltover* that Rafidain's nonpayment caused an "immediate consequence" in the United States. The letters of credit at issue do not require payment into or from the United States,[17] nor do they select the United States as a forum or require the application of United States law. Even assuming, as plaintiffs allege,[18] that Rafidain

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[16] (...continued)
irrelevant." 764 F.2d at 1112. First, *Callejo* is a pre-*Weltover* decision. Second, the facts of *Callejo* are distinguishable from the present case. In *Callejo*, the question of whether there was a direct effect in the United States was resolved without reference to the place of payment because the plaintiffs were located in the United States, and "the effects of the [defendant's] breach of contract were inevitably felt by them there." *Id.*

[17] Plaintiffs allege that in the early to mid-1980's, Rafidain issued letters of credit to plaintiffs that contained specific instructions that payments were to be reimbursed from Rafidain's accounts. This fact is not sufficient to establish subject matter jurisdiction over Rafidain with respect to the letters of credit in this action.

[18] As stated earlier, the Court agrees with the defendant that the place of performance on the letters of credit at issue occurred outside the United States, where plaintiffs collected payment. However, the Court concludes that even if plaintiffs could establish that all 37 payments occurred in New York, this fact is not sufficient to establish jurisdiction under the "direct effects" clause
(continued...)

made most or all of the 37 payments plaintiffs received on the 14 letters of credit at issue from its accounts in the United States, the Court finds this fact alone insufficient to establish jurisdiction under the "direct effects" clause of § 1602(a)(2) of the FSIA.

3. Presidential Freeze under IEEPA

Plaintiffs argue that Executive Order 12,722[19] issued by President Bush on August 2, 1990, pursuant to the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701-1706 (1982), suspended any sovereign immunity that Rafidain Bank might otherwise have been able to assert. Plaintiffs argue that (1) an IEEPA freeze supersedes any right to immunity under the FSIA; (2) the President exercises his inherent powers to control foreign relations and suspends the sovereign immunity of the foreign sovereign when he invokes a freeze against a foreign sovereign under IEEPA; (3) a foreign sovereign implicitly waives it immunity in U.S. courts when it repudiates its foreign debt.

In support of these arguments, plaintiffs rely on *New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co.*, 502 F. Supp. 120, 131 (S.D.N.Y. 1980), where the court held that a similar IEEPA order declared by President Carter in response to the Iranian hostage crisis effected a suspension of Iran's sovereign immunity from prejudgment interest in the United States. Following the district court's decision, the United States and Iran brought an interlocutory appeal. However an intervening settlement between the United States and Iran prevented the court from

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[18] (...continued)
of § 1605(a)(2) of the FSIA.

[19] Executive Order 12,722 blocked "all property and interests in property of the Government of Iraq, its agencies, instrumentalities and controlled entities and the Central Bank or Iraq that are in the United States.

ever addressing the immunity issue.[20] "While this case is relevant, it is not dispositive." *First City, Texas-Houston, N.A. v. Rafidain Bank & Central Bank of Iraq*, No. 90-7360 Mem. Order at 5-6 (S.D.N.Y., Sept. 25, 1992). This Court is of the opinion that the United States government would have explicitly terminated or suspended Iraqi agencies' sovereign immunity in Executive Order 12,722 or its regulations, had it so intended. *See E-Systems, Inc. v. Islamic Republic of Iran*, 491 F. Supp. 1294, 1302-03 (N.D. Tex. 1980) (holding that Treasury Department regulations promulgated pursuant to Iranian sanctions orders were not intended to abrogate the attachment provisions of FSIA and stating "if the Treasury Dept. wishes to abrogate the existing law of prejudgment attachment of assets of foreign countries . . ., it could do so in a clearer fashion."). Therefore, the Court holds that Rafidain Bank is entitled to assert its right to sovereign immunity as embodied in the FSIA.

III. CONCLUSION

Because the Court finds that the allegations in plaintiffs' Complaint do not satisfy the elements required to establish subject matter jurisdiction under the FSIA, it does not address whether exercising personal jurisdiction over Rafidain would violate due process, nor does it address whether the case should be dismissed in deference to the pending involuntary liquidation proceedings against Rafidain in England or on the grounds of *forum non conveniens*. For all of the reasons stated above, the

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[20] The Second Circuit remanded the case for reconsideration in light of the settlement. 646 F.2d 779 (2d Cir. 1981).

Court hereby dismisses this case. An Order in accordance with this Memorandum Opinion shall be issued herewith.

Date: 15th December 1992

/s/
Thomas F. Hogan
United States District Judge

APPENDIX E

[Filed October 9, 1991]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 91-2530

Goodman Holdings, and
Anglo Irish Beef Processors International,
Plaintiffs,

v.

Rafidain Bank,
Defendant.

COMPLAINT FOR DAMAGES AND DECLARATORY RELIEF

Plaintiffs Goodman Holdings and Anglo Irish Beef Processors International, by their attorneys, Kirkland & Ellis, for their complaint, allege as follows:

Nature of Action

1. This is a civil action arising out of the commercial activities of agencies or instrumentalities of the government of Iraq carried on in the United States and/or causing substantial, foreseeable and direct effects in the United States. This action seeks monetary damages from defendant Rafidain Bank for breach of its obligation to honor irrevocable letters of credit issued by defendant. This action also seeks a declaration that defendant Rafidain Bank has breached its obligations under the letters of credit and that the amounts alleged herein are due and owing to plaintiffs.

The Parties

2. Plaintiff Goodman Holdings is a corporation organized under the laws of the Republic of Ireland (Eire) and maintains its principal place of business at 14 Castle Street, Ardee, Co. Louth, Republic of Ireland. Goodman Holdings was originally incorporated with limited liability and known as "Anglo Irish Beef Packers Group Limited," and subsequently as "Goodman Holdings Limited." It was re-registered as an unlimited company and given its current name on February 1, 1988.

3. Plaintiff Anglo Irish Beef Processors International ("AIBPI"), a wholly owned subsidiary of Goodman Holdings, is a corporation organized under the laws of the Republic of Ireland and maintains its principal place of business at 14 Castle Street, Ardee, Co. Louth, Republic of Ireland. AIBPI was originally incorporated with limited liability and known as "Anglo Irish Beef Packers (International) Limited," and subsequently as "Anglo Irish Beef Processors International Limited." It was re-registered as an unlimited company and given its current name on September 18, 1989.

4. Both plaintiffs are in the business of purchasing, processing and selling beef, lamb, and other meats.

5. Upon information and belief, defendant Rafidain Bank is a bank wholly owned by the government of Iraq, and is an agency or instrumentality of a foreign state, within the meaning of the Foreign Sovereign Immunities Act of 1976, as amended. Rafidain Bank maintains its principal place of business at New Banks Street, Baghdad, Iraq.

6. During all relevant times alleged herein, Rafidain Bank has been doing business in the United States through its agents and activities here and has substantial assets in the U.S. Upon information and belief, Rafidain Bank has at least $135.84 million on deposit in United States banks, of which $16.81 million is designated "operating funds" and $119.03 million is designated "deposits to cover credits." In the past, Rafidain

Bank has used such funds on deposit at U.S. banks to effect payment to plaintiff Goodman Holdings in the United States on one or more of the letters of credit at issue in this action.

7. Upon information and belief, Rasheed Bank is another bank wholly owned by the government of Iraq, and is also an agency or instrumentality of a foreign state, within the meaning of the Foreign Sovereign Immunities Act of 1976, as amended. Rasheed Bank maintains its principal place of business at Haifa Street, Baghdad, Iraq. Rasheed Bank is also variously known as "Al-Rasheed Bank" or "Rashid Bank."

8. Rasheed Bank was created in November 1988 from certain of the assets of defendant Rafidain Bank. Upon information and belief, Rasheed Bank is the former Number 106 branch of Rafidain Bank. Upon further information and belief, Rasheed Bank was originally formed for the purpose of ultimately replacing Rafidain Bank as Iraq's international bank for commercial operations, and the activities of the two banks have been closely coordinated.

9. During all relevant times alleged herein, Rasheed Bank has been doing business in the United States through its agents and activities here and currently maintains substantial assets in the U.S. Upon information and belief, Rasheed Bank has at least $305.77 million on deposit in United States banks, of which $264.35 million is designated "operating funds" and $41.42 million is designated "deposits to cover credits."

10. Upon information and belief, Rasheed Bank held meetings with officials at the U.S. Department of the Treasury and other responsible authorities in June 1990, in preparation for the official opening of a branch in New York City. Rasheed Bank apparently had not yet opened this branch by the time Iraq invaded Kuwait on August 2, 1990.

11. In addition to other activities in the United States, defendant Rafidain Bank and Rasheed Bank have been conducting their business in the United States through correspondent accounts and relationships with a number of

major U.S. banks. Upon information and belief, these banks include the Bank of New York (formerly Irving Trust Company), Chase Manhattan Corporation, BankAmerica Corporation, Chemical Banking Corporation, Citicorp, Continental Bank Corporation, Manufacturer's Hanover Corporation, and J.P. Morgan & Company.

12. The Central Bank of Iraq ("Central Bank") is the central banking authority of Iraq and maintains its principal place of business in Baghdad, Iraq.

13. During all relevant times alleged herein, the Central Bank has been doing business in the United States through its agents and activities here and currently maintains substantial assets in the U.S. Upon information and belief, the Central Bank has at least $973.25 million on deposit in U.S. banks, of which $704.94 million is designated "operating funds" and $188.31 million is designated "deposits to cover credits."

14. Upon information and belief, the Central Bank, defendant Rafidain Bank and Rasheed Bank are all alter egos of one another, at least with respect to the activities and letters of credit at issue in this action. In addition, all three banks are controlled by, are supervised by, and report to the Iraqi Minister of Finance.

Jurisdiction and Venue

15. This is a civil action against a bank that is owned and controlled by the Government of Iraq (which is a foreign state as defined in 28 U.S.C. § 1603(a)) and that is amenable to suit under 28 U.S.C. § 1605. The court has jurisdiction over these parties under 28 U.S.C. § 1330(a). Venue is appropriate under 28 U.S.C. § 1391(f), because the defendant is doing business in this judicial district, and because this action is brought against a foreign state, as defined above.

Factual Background
Common to All Counts

16. Plaintiffs Goodman Holdings and AIBPI, and affiliated corporations in the same group, conducted substantial business with agencies or instrumentalities of the Government of Iraq, all before Iraq's invasion of Kuwait on August 2, 1990.

17. Between 1986 and 1990, plaintiffs Goodman Holdings and AIBPI, and affiliated corporations in the same group, sold large quantities of meat, principally beef, to three companies owned and controlled by the government of Iraq. These three Iraqi purchasers were the Iraqi Company for Agricultural Products Marketing ("ICAPM"), the State Company for Foodstuff Trading ("SCFT"), and the Iraqi Company for Meat Production and Marketing ("ICMPM").

18. In conjunction with this role as a supplier of food products for the population of Iraq, plaintiffs Goodman Holdings and AIBPI, and/or their affiliates, entered into a series of contracts with the different Iraqi purchasers. Each contract called for the delivery of a stated maximum quantity of meat, to be shipped in installments over varying lengths of time. The parties agreed that, in all instances, payment for each installment of meat products delivered would be made through international banking channels by drawing against letters of credit opened at either defendant Rafidain Bank or Rasheed Bank.

19. To effect payment on the contracts described above, fourteen (14) irrevocable letters of credit were opened either at defendant Rafidain Bank or at Rasheed Bank, with one or more letters of credit matching each contract. All of the letters of credit were issued in favor of either plaintiff Goodman Holdings or plaintiff AIBPI, except that one letter of credit was originally issued in favor of an affiliated company, Anglo Irish Beef Processors (SARL), and subsequently amended to name Goodman Holdings as the beneficiary.

20. Of these 14 letters of credit opened by the Iraqi purchasers, eleven (11) were issued by defendant Rafidain Bank and three (3) were issued by Rasheed Bank, as described below:

(a) Three (3) of the 11 letters of credit issued by defendant Rafidain Bank are payable to plaintiff AIBPI and are denominated in U.S. dollars.

(b) Eight (8) of the 11 letters of credit issued by defendant Rafidain Bank are payable to plaintiff Goodman Holdings. One of these eight letters of credit is denominated in U.S. dollars, and the remaining seven are denominated in German Deutsche Marks.

(c) All three letters of credit issued by Rasheed Bank are payable to plaintiff AIBPI and are denominated in U.S. dollars.

21. A summary of all these letters of credit, along with relevant information regarding the corresponding contracts between either of the plaintiffs (or their affiliates) and the Iraqi purchasers, is set forth in the following table:

SUMMARY TABLE OF LETTERS OF CREDIT AND CORRESPONDING CONTRACTS

Letter of Credit	Contract Date	Buyer	Subject Matter	Value of Credit	Issuing Bank	Beneficiary
19/31598	3/20/86	ICAPM	Boneless Beef	US$ 24,412,500.00	Rafidain	Goodman Holdings
19546/87/109	6/87	SCFT	Boneless Beef	DM 76,755,000.00	Rafidain	Goodman Holdings
19577/87/109	6/87	SCFT	Boneless Beef	DM 95,943,750.00	Rafidain	Goodman Holdings
19/31905	6/87	ICAPM	Boneless Beef	DM 22,807,200.00	Rafidain	Goodman Holdings
19/32088	6/87	ICAPM	Boneless Beef	DM 32,780,781.25	Rafidain	Goodman Holdings
19927/109	12/13/87	SCFT	Boneless Beef	DM 57,102,500.00	Rafidain	Goodman Holdings[1]
19926/109	12/13/87	SCFT	Boneless Beef	DM 37,687,650.00	Rafidain	Goodman Holdings[2]
20555/109	12/13/87	SCFT	Boneless Beef	DM 76,517,350.00	Rafidain	Goodman Holdings
62/88/24434	4/18/88	ICMPM	Boneless Beef	US$ 18,360,000.00	Rafidain	AIBPI
28059	9/4/88	ICMPM	Bone-in lamb/mutton	US$ 15,600,000.00	Rafidain	AIBPI
30602	1/8/89	ICMPM	Boneless Beef	US$ 5,950,000.00	Rafidain	AIBPI
516/106	12/12/88	SCFT	Boneless Beef	US$ 40,312,500.00	Rasheed	AIBPI
806/106	2/2/89	SCFT	Boneless Beef	US$ 47,925,000.00	Rasheed	AIBPI
535/106	12/12/88	SCFT	Bone-in lamb mutton	US$ 9,750,000.00	Rasheed	AIBPI

[1] This letter of credit was originally issued in favor of AIBPI's predecessor, Anglo Irish Beef Processors (International) Limited. The beneficiary was changed to Anglo Irish Beef Packers Group Limited (a predecessor of Goodman Holdings) by an amendment dated on or about July 9, 1988.

[2] This letter of credit was originally issued in favor of Anglo Irish Beef Processors (SARL), a wholly owned subsidiary of Goodman Holdings and an affiliate of AIBPI. The beneficiary was changed to Anglo Irish Beef Packers Group Limited (a predecessor of Goodman Holdings) by an amendment dated on or about July 9, 1988.

22. Under the terms of each letter of credit, payment for each installment of meat shipped by plaintiffs was due on a given "maturity date." This maturity date was typically 360 or 540 days from the date of the bill of lading for each shipment. Upon presentation of the documents specified in the letters of credit pertaining to a given installment, payment for that installment was to be made by Rafidain Bank or Rasheed Bank at the relevant maturity date, thereby reducing the total amount available under the applicable letter of credit.

23. On August 2, 1990, Iraq launched a hostile invasion of Kuwait and overthrew the Kuwaiti government. On that same day, in response to the Iraqi invasion, President George Bush issued Executive Order 12722, which generally prohibits transactions with Iraq and freezes Iraqi assets located in or subject to the jurisdiction of the U.S. On August 9, 1990, President Bush issued Executive Order 12724, which modified Executive Order 12722, but continued the general prohibition on transactions with Iraq and the freeze of Iraqi assets.

24. Plaintiffs or their affiliates shipped all installments of meat under all contracts before August 2, 1990.

25. All the maturity dates specified in the letters of credit for the installment shipments have now passed, and defendant Rafidain Bank is in default with respect to all installments remaining unpaid.

26. Plaintiffs have complied with all conditions required for payment under the letters of credit, and have demanded payment on the past due amounts.

COUNT I

(Claims Of Goodman Against Rafidain In U.S. Dollars)

27. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 26 hereof as if fully set forth herein.

28. Defendant Rafidain Bank has wrongfully failed to make full payment of the principal due for the installment

maturing on May 24, 1988, under Letter of Credit No. 19/31598, issued in favor of plaintiff Goodman Holdings in U.S. dollars, and therefore owes Goodman Holdings $233,932.97 in principal plus interest under this letter of credit.

29. In addition, the payments of principal that defendant Rafidain Bank did make on other installments under this Letter of Credit No. 19/31598, issued in favor of Goodman Holdings in U.S. dollars, were all made late, on dates ranging from six (6) to 675 days after the respective maturity dates for those installments. Defendant Rafidain Bank consequently owes Goodman Holdings interest, and has wrongfully failed to make any interest payments, on these late payments of principal.

30. The details regarding this claim, including the principal amounts remaining unpaid and the number of days that principal amounts were paid late, are set forth in the following table:

COUNT I TABLE

L/C No. 19/31598

B/L Date	Net Metric Tons	Value (US$)	Maturity	Date Paid	Days Delay	Principal Unpaid (US$)
10/30/86	1,706.3587	$3,967,283.97	10/25/87	11/10/87	16	—
11/26/86	1,781.3001	$4,141,522.73	11/21/87	12/31/87	40	—
1/10/87	1,232.7097	$2,866,050.05	1/05/88	1/22/88	17	—
1/10/87	600.6718	$810,906.93	1/05/88	1/13/88	8	—
1/30/87	1,003.1423	$2,332,305.84	1/25/88	2/24/88	30	—
1/30/87	737.0995	$995,084.32	1/25/88	2/04/88	10	—
3/27/87	1,815.0502	$2,450,317.77	3/21/87	3/28/88	7	—
4/02/87	1,428.1723	$3,320,500.59	3/27/88	4/02/88	6	—
4/02/87	498.8903	$673,392.55	3/27/88	4/02/88	6	—
5/14/87	1,982.6543	$4,609,671.25	5/08/88	1/12/90	614	—
5/30/87	447.2830	$1,039,932.97	5/24/88	3/30/90	675*	$233,932.97*
5/30/87	83.7114	$113,010.39	5/24/88	3/30/90	675	—
TOTALS	13,316.9626	$27,319,979.36				$233,932.97

* A partial payment of $806,000 was made on the principal amount due of $1,039,932.97, on March 30, 1990 (675 days after the original maturity date). The amount of $233,932.97 remains unpaid.

31. By reason of the foregoing, plaintiff Goodman Holdings has suffered damages of at least US$ 233,932, the precise amount to be determined at trial, plus the amount of interest due on this unpaid principal and on the late payments of principal, as provided for by law.

COUNT II

(Claims Of Goodman Against Rafidain In DM)

32. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 31 hereof as if fully set forth herein.

33. Defendant Rafidain Bank has also wrongfully failed to make any payment of principal on fifty-eight (58) installments due under the seven letters of credit issued in favor of plaintiff Goodman Holdings in Deutsche Marks, and therefore owes Goodman Holdings the unpaid principal plus interest under these letters of credit.

34. In addition, the payments of principal that defendant Rafidain Bank did make on other installments under the seven letters of credit, issued in favor of Goodman Holdings in German Deutsche Marks, were all made late, on dates ranging from 46 to 606 days after the respective maturity dates for those installments. Defendant Rafidain Bank has wrongfully failed to make any interest payments on these principal amounts paid late.

35. The details regarding this claim, including the principal amounts remaining unpaid and the number of days that principal amounts were paid late, are set forth in the following table:

COUNT II TABLE

L/C No. 19546/87/109

B/L Date	Net Metric Tons	Value (DM)	Maturity	Date Paid	Days Delay	Principal Unpaid (DM)
9/09/87	994.2437	6,167,543.76	9/3/88	10/19/88	46	—
9/25/87	2,055.7416	13,149,037.21	9/19/88	3/13/89	175	—
10/04/87	563.5074	3,604,334. 21	9/28/88	2/20/89	145	—
10/23/87	1,014.2628	6,487,478.43	10/17/88	3/23/89	157	—
10/29/87	1,726.3092	11,041,905.22	10/23/88	3/14/89	142	—
11/20/87	1,186.7175	7,590,541.81	11/14/88	5/05/89	172	—
11/30/87	1,717.1665	10,983,426.22	11/24/88	4/07/89	134	—
12/11/87	1,436.3256	9,187,097.62	12/5/88	6/01/89	178	—
12/31/87	1,657.1441	10,599,507.95	12/25/88	6/21/89	178	—
1/14/88	2,026.0900	12,959,378.16	1/08/89	7/25/89	198	—
1/27/88	622.4916	3,927,915.90	1/21/89	7/06/89	166	—
TOTALS	15,000.0000	95,698,166.49				—

COUNT II TABLE (Cont.)

L/C No. 19/31905

B/L Date	Net Metric Tons	Value (DM)	Maturity	Date Paid	Days Delay	Principal Unpaid (DM)
9/9/87	480.9024	1,694,237.93	9/3/88	5/2/90	606	—
		415,000.00	9/3/88			415,000.00
9/25/87	216.4629	949,406.28	9/19/88	5/2/90	590	—
10/4/87	1,195.1888	5,229,022.01	9/28/88			5,229,022.01
11/30/87	281.5100	1,234,702.86	11/24/88			1,234,702.86
1/14/88	208.1909	913,125.28	1/08/89			913,125.28
1/27/88	182.8009	797,220.76	1/21/89			797,220.76
2/19/88	144.3347	633,051.99	2/13/89			633,051.99
2/27/88	45.7708	200,750.73	2/21/89			200,750.73
3/31/88	912.2626	4,001,183.76	3/26/89			4,001,183.76
7/20/88	13.0970	57,443.44	7/15/89	9/22/89	69	—
7/26/88	1,509.7512	6,621,768.76	7/21/89			6,621,768.76
TOTALS	**5,190.2722**	**22,746,913.80**				**20,045,826.15**

COUNT II TABLE (Cont.)

L/C No. 19/32088

B/L Date	Net Metric Tons	Value (DM)	Maturity	Date Paid	Days Delay	Principal Unpaid (DM)
9/9/87	515.5511	3,297,593.72	9/3/88			3,297,593.72
9/25/87	143.9925	921,012.03	9/19/88			921,012.03
10/4/87	360.7275	2,277,898.10	9/28/88			2,277,898.10
10/29/87	121.2980	775,852.33	10/23/88			775,852.33
11/20/87	488.0317	3,121,572.76	11/14/88			3,121,572.76
12/11/87	516.8250	3,305,741.91	12/05/89			3,305,741.91
1/27/88	513.0268	3,262,851.52	1/21/89			3,262,851.52
2/27/88	468.8279	2,998,740.26	2/21/89			2,998,740.26
3/31/88	92.9900	594,787.29	3/26/89			594,787.29
5/31/88	393.4736	2,516,755.51	5/08/89			2,516,755.51
7/26/88	1,501.7029	9,605,267.17	7/21/89			9,605,267.17
TOTALS	**5,116.4470**	**32,678,072.60**				**32,678,072.60**

COUNT II TABLE (Cont.)

L/C No. 19677/87/109

B/L Date	Net Metric Tons	Value (DM)	Maturity	Date Paid	Days Delay	Principal Unpaid (DM)
1/27/88	665.4944	4,228,711.24	1/21/89	7/07/89	167	—
2/19/88	1,706.9837	10,918,294.49	2/13/89	10/06/89	235	—
2/27/88	1,156.2106	7,395,412.37	2/21/89	3/08/90	380	—
3/17/88	1,868.4493	8,934,998.00	3/12/89	12/08/89	271	—
		3,016,070.83	3/12/89	1/10/90	304	—
3/31/88	831.2508	5,316,887.93	3/26/89	1/22/90	302	—
4/14/88	1,462.5676	9,354,948.01	4/09/89	2/26/90	323	—
5/12/88	1,476.9471	4,283,749.25	5/07/89	4/23/90	351	—
		1,267,830.00	5/07/89	6/28/90	417	—
		3,320,000.00	5/07/89	7/23/90	442	—
		575,343.64	5/07/89			575,343.64
5/18/88	1,867.2901	11,943,398.45	5/13/89			11,943,398.45
5/30/88	1,297.4460	8,298,784.98	5/25/89			8,298,788.98
6/21/88	1,497.4531	9,578,084.39	6/16/89			9,578,084.39
6/29/88	1,169.1388	7,478,304.05	6/24/89			7,478,104.05
TOTALS	**14,999.1916**	**95,910,681.63**				**37,873,719.51**

COUNT II TABLE (Cont.)

L/C No. 19927/109

B/L Date	Net Metric Tons	Value (DM)	Maturity	Date Paid	Days Delay	Principal Unpaid (DM)
5/28/88	2,363.0780	13,492,624.09	11/19/89			13,492,624.09
5/30/88	602.6338	3,441,189.66	11/21/89	5/17/90	177	—
6/30/88	1,500.0000	8,565,375.00	12/22/89			8,565,375.00
6/30/88	660.0350	3,768,964.86	12/22/89			3,768,964.86
7/20/88	799.5664	4,565,724.03	1/11/90			4,565,724.03
7/23/88	1,054.7619	6,022,954.14	1/14/90			6,022,954.14
7/31/88	1,151.4330	6,574,970.29	1/22/90			6,574,970.29
8/23/88	595.2393	3,398,965.21	2/14/90			3,398,965.21
8/27/88	1,273.2440	7,270,541.55	2/18/90			7,270,541.55
TOTALS	**9,999.9914**	**57,101,308.83**				**53,660,119.27**

COUNT II TABLE (Cont.)

L/C No. 19926/109

B/L Date	Net Metric Tons	Value (DM)	Maturity	Date Paid	Days Delay	Principal Unpaid (DM)
6/30/88	591.4170	3,301,763.62	12/22/89			3,301,763.62
7/23/88	249.7691	1,426,244.00	1/14/90			1,426,244.00
7/29/88	944.2024	5,391,631.75	1/20/90			5,391,631.75
7/31/88	250.0570	1,427,887.98	1/22/90			1,427,887.98
8/23/88	1,011.5383	5,776,022.37	2/14/90			5,776,022.37
8/31/88	436.6718	2,493,505.14	2/22/90			2,493,505.14
9/23/88	1,477.5780	8,437,339.77	3/17/90			8,437,339.77
9/29/88	40.0444	228,663.53	3/23/90			228,663.53
10/14/88	1,010.8531	5,772,223.91	4/7/90			5,772,223.91
10/31/88	345.7264	1,974,184.40	4/24/90			1,974,184.40
10/31/88	74.7540	426,864.03	4/24/90			426,864.03
TOTALS	**6,432.5915**	**36,656,350.50**				**36,656,350.50**

COUNT II TABLE (Cont.)

L/C No. 20555/109

B/L Date	Net Metric Tons	Value (DM)	Maturity	Date Paid	Days Delay	Principal Unpaid (DM)
9/29/88	348.7119	1,838,197.43	3/23/90			1,838,197.43
10/14/88	1,446.7743	8,261,442.95	4/7/90			8,261,442.95
10/12/88	1,431.3430	8,173,326.36	4/5/90			8,173,326.36
10/27/88	1,506.7092	8,603,686.21	4/20/90			8,603,686.21
10/30/88	346.1555	1,976,634.44	4/23/90			1,976,634.44
10/31/88	641.0370	3,660,481.53	4/24/90			3,660,481.53
11/30/88	137.6490	786,010.20	5/24/90			786,010.20
11/30/88	1,484.5570	8,477,191.61	5/24/90			8,477,191.61
11/30/88	1,283.2052	7,327,422.49	5/24/90			7,327,422.49
12/31/88	389.6880	2,225,215.90	6/24/90			2,225,215.90
12/31/88	1119.0762	6,390,204.87	6/24/90			6,390,204.87
12/31/88	589.4385	3,365,841.19	6/24/90			3,365,841.19
12/31/88	415.6338	2,373,372.91	6/24/90			2,373,372.91
12/31/88	1,676.7070	9,574,416.15	6/24/90			9,574,416.15
TOTALS	**12,816.6856**	**73,033,444.24**				**73,033,444.24**

36. By reason of the foregoing, plaintiff Goodman Holdings has suffered damages of at least DM 253,947,508, the precise amount to be determined at trial, plus the amount of interest due on this unpaid principal and on the late payments of principal, as provided for by law.

COUNT III
(Claims Of AIBPI Against Rafidain)

37. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 36 hereof as if fully set forth herein.

38. Defendant Rafidain Bank has wrongfully failed to make any payment of principal for the installments due under the three letters of credit issued in favor of plaintiff AIBPI in U.S. dollars, and therefore owes Goodman Holdings the unpaid principal plus interest under these letters of credit.

39. The details regarding this claim are set forth in the following table:

COUNT III TABLE

L/C No. 62/88/24434

B/L Date	Net Metric Tons	Value (US$)	Maturity	Date Paid	Principal Unpaid (US$)
9/29/88	909.0023	$2,272,505.75	3/23/90		$2,272,505.75
10/27/88	497.0915	$1,242,728.75	4/20/90		$1,242,728.75
10/30/88	600.5805	$1,501,451.25	4/23/90		$1,501,451.25
10/31/88	236.3977	$590,994.25	4/24/90		$590,994.25
12/07/88	1,030.6355	$2,576,588.75	5/31/90		$2,576,588.75
12/18/88	808.2107	$2,020,526.75	6/11/90		$2,020,526.75
3/22/89	718.3169	$1,795,792.25	9/13/90		$1,795,792.25
3/31/89	1,796.3928	$4,490,982.00	9/22/90		$4,490,982.00
4/12/89	380.8911	$952,227.75	10/4/90		$952,227.75
8/31/89	365.5039	$913,759.75	2/22/91		$913,759.75
TOTALS	7,343.0229	$18,357,557.25			$18,357,557.50

L/C No. 28059

B/L Date	Net Metric Tons	Value (US$)	Maturity	Date Paid	Principal Unpaid (US$)
12/12/88	1,438.9755	$2,806,002.23	6/05/90		$2,806,002.23
12/31/88	488.9310	$875,415.45	6/24/90		$875,415.45
3/21/89	3,003.8511	$5,857,509.65	9/12/90		$5,857,509.65
TOTALS	4,891.7576	$9,538,927.33			$9,538,927.33

COUNT III TABLE (cont.)

L/C No. 30602

B/L Date	Net Metric Tons	Value (US$)	Maturity	Date Paid	Principal Unpaid (US$)
4/14/89	976.5824	$2,324,266.11	10/06/90		$2,324,266.11
8/19/89	504.4562	$1,200,605.71	2/10/91		$1,200,605.71
9/27/89	1,019.1552	$2,425,589.38	3/21/91		$2,425,589.38
TOTALS	2,500.1938	$5,950,461.20			$5,950,461.20

40. By reason of the foregoing, plaintiff AIBPI has suffered damages of at least US$ 33,846,945, the precise amount to be determined at trial, plus the amount of interest due on this unpaid principal, as provided for by law.

Prayer for Relief

WHEREFORE, plaintiffs Goodman Holdings and Anglo Irish Beef Processors International respectfully request the following judgment:

a. A declaration that defendant Rafidain Bank has breached its obligations under the letters of credit described herein and that the amounts alleged herein are due and owing to plaintiffs.

b. Under Count I, an award of damages in favor of plaintiff Goodman Holdings against Rafidain Bank, including any assets of Rafidain Bank or its alter egos located in or subject to the jurisdiction of the United States, of US$ 233,932, plus interest on this amount and on the principal amounts paid late.

c. Under Count II, an award of damages in favor of plaintiff Goodman Holdings against Rafidain Bank, including any assets of Rafidain Bank or its alter egos located in or subject to the jurisdiction of the United States, of DM 253,947,508, plus interest on this amount and on the principal amounts paid late.

d. Under Count III, an award of damages in favor of plaintiff AIBPI against Rafidain Bank, including any assets of Rafidain Bank or its alter egos located in or subject to the jurisdiction of the United States, of US$ 33,846,945, plus interest on this amount.

e. Plaintiffs' attorneys' fees and such other and further relief as the Court deems just and proper.

Dated: October 9, 1991

Respectfully submitted,

/s/

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(2)

Supreme Court, U.S.
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No. 94-765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GOODMAN HOLDINGS and ANGLO IRISH BEEF PROCESSORS INTERNATIONAL,

Petitioners,

v.

RAFIDAIN BANK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Dated: November 23, 1994

31 pp

QUESTION PRESENTED

Does the commercial activities exception to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 ("FSIA"), provide a basis for subject matter jurisdiction in the United States courts over a non-U.S. plaintiff's breach of contract claims against a foreign state where (i) the parties' contractually designated place of performance is outside the United States, and (ii) prior to breach, the parties actually performed their contractual obligations outside the United States?

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No. 94-765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GOODMAN HOLDINGS and ANGLO IRISH BEEF PROCESSORS INTERNATIONAL,

Petitioners,

v.

RAFIDAIN BANK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Rafidain Bank ("Rafidain") respectfully requests that this Court deny the petition for a writ of certiorari filed by petitioners Goodman Holdings and Anglo Irish Beef Processors International (together "Goodman"), which seeks review of the decision of the United States Court of Appeals for the District of Columbia Circuit (the "Court of Appeals").[1]

[1] In accordance with Rule 29.1 of the Rules of this Court, Rafidain represents that it is an agency or instrumentality of the Republic of Iraq and that it does not have any parent or subsidiary companies.

OPINIONS BELOW

The decision of the Court of Appeals, *Goodman Holdings v. Rafidain Bank*, is reported at 26 F.3d 1143 (D.C. Cir. 1994) and is reprinted at Goodman's Appendix ("App.") 1a-9a. The orders denying Goodman's Petition for Rehearing and Suggestion for Rehearing *In Banc* are reprinted at App. 10a, 11a. The district court's unreported decision is reprinted at App. 13a-30a.

PERTINENT STATUTORY PROVISIONS

The pertinent statutory provision, 28 U.S.C. § 1605(a)(2), is reprinted in Goodman's petition at 2. Additional relevant statutory provisions are set forth in the Appendix hereto.

STATEMENT OF THE CASE

Pursuant to Rule 15.1 of the Rules of this Court, Rafidain provides the following statement to correct numerous misstatements and distortions in Goodman's petition.

The Agreements At Issue Are Unrelated To The United States

This is an action for nonpayment of fourteen separate letters of credit issued by Rafidain, an Iraqi bank.[2] The letters of credit were issued to Goodman Holdings and its affiliate, both Irish corporations, to facilitate the sales of beef and other meats from Ireland to Iraq. Seven of the letters of credit are denominated in German deutsche marks and the others in U.S. dollars. Complaint ¶ 20, App. 36a.

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[2] For purposes of the proceedings below, Rafidain and the lower courts accepted as true the allegations of the complaint, including Goodman's assertion that Rafidain is responsible, either directly or as alter ego, for the 14 letters of credit at issue here.

Rafidain has no branch, agency or office in the United States. The letters of credit were neither issued, negotiated nor executed in the United States.

The letters of credit require payment to be made to Goodman in Ireland. The letters do not require Rafidain to fund payments from any source within the United States, do not contain a waiver of Rafidain's sovereign immunity, and do not designate the United States as a forum for disputes between the parties.

Prior to defaulting, Rafidain made payments to Goodman in Ireland on a few of the letters of credit. However, Rafidain made no payments on the majority of the letters, and only a handful of payments on two others. Complaint, Counts II and III Tables, App. 43a-51a. Upon Rafidain's default, Goodman commenced a nonpayment action against Rafidain in the High Court in London. However, the Bank of England issued a provisional order of liquidation against Rafidain (which has a branch in London), and appointed Provisional Liquidators to oversee the liquidation proceedings. Goodman then brought the instant action for the same relief in the United States District Court for the District of Columbia.

Proceedings in the District Court

Goodman served discovery as to a number of matters, including the letters of credit, Rafidain's source of funds for payment of the letters, proceeds from petroleum sales, credit facilities, and officers and directors. Rafidain responded to Goodman's requests for admission regarding payments of the letters of credit and objected to requests that were unrelated to Goodman's claims. Goodman did not move to compel further discovery responses from Rafidain.

Rafidain moved to dismiss the complaint on the ground that the district court lacked both subject matter jurisdiction under the FSIA and personal jurisdiction under the Due Process Clause of the Fifth Amendment to the United States

Constitution. Rafidain also moved to dismiss in accordance with the doctrines of international comity and *forum non conveniens*.

In opposing the motion, Goodman effectively supplemented the factual allegations of its complaint with assertions in its briefs regarding Rafidain's general commercial activities. Notably, Goodman did not submit the letters of credit to the district court, and they are not in the record.

Following oral argument on Rafidain's motion, the district court granted the motion to dismiss for lack of subject matter jurisdiction. App. 13a. The district court assumed the truth of the factual allegations in Goodman's complaint and briefs for purposes of the motion. Applying this Court's decision in *Republic of Argentina v. Weltover, Inc.*, 112 S. Ct. 2160 (1992) ("*Weltover*"), the district court held that Goodman's allegations and arguments did not support a finding of subject matter jurisdiction because, among other reasons, the act of nonpayment outside the United States did not have an immediate consequence or "direct effect" in the United States, under the third clause of Section 1605(a)(2) ("Clause 3").

Decision of the Court of Appeals

The Court of Appeals affirmed without dissent. The appellate court held that Rafidain's default did not have a "direct effect" in the United States because (i) the United States was not the place of performance for Rafidain's contractual obligations, and (ii) Rafidain's prior use of New York bank accounts to fund payments was inconsequential because the parties neither contractually required nor designated Rafidain's New York accounts as the source of funds for payment on the letters. 26 F.3d at 1146-47. In a concurring opinion, Judge Wald expressed her view that the United States need not be the contractually designated place of performance in order for a breach to have a direct effect here. Nonetheless, Judge Wald agreed that the facts as alleged

by Goodman do not support Clause 3 jurisdiction. 26 F.3d at 1147.

Goodman's petition for rehearing and suggestion for rehearing *in banc* were denied.

REASONS FOR DENYING THE PETITION

Under Rule 10.1 of the Rules of this Court, a petition for writ of certiorari should not be granted absent "special and important reasons." No such reasons are present here. The Court of Appeals' decision accords with the FSIA and expressly follows this Court's two recent decisions addressing the commercial activities exception: *Weltover*, *supra*, and *Saudi Arabia v. Nelson*, 113 S. Ct. 1471 (1993) ("Nelson"). If anything, the decision below is unremarkable and certainly does not raise any important issue that would require this Court to re-visit Clause 3 of the exception.[3]

Goodman's obligatory assertion of a circuit split is astonishing. Significantly, all but three of the decisions cited by Goodman are pre-*Weltover* cases. There is no split among the circuits, much less a "real and embarrassing" conflict of opinion warranting certiorari. *See Layne v. Bowler Corp. v. Western Well Works*, 261 U.S. 387, 392-93 (1923).

Review is also unnecessary because the court below could have dismissed the action on several alternate grounds, including lack of *in personam* jurisdiction, forum non conveniens, and international comity. See Point III, *infra*. Thus, the question presented for review by Goodman may be academic, further demonstrating the lack of any "special and important" reason for granting a writ of certiorari.

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[3]Although Goodman argued in the courts below that this case also falls within the first clause of the commercial activities exception, the Court of Appeals -- relying on *Nelson*, -- rejected Goodman's argument. 26 F.3d at 1146. Goodman does not raise the clause one argument in its petition.

I. THE DECISION BELOW DOES NOT RAISE ANY IMPORTANT ISSUES CONCERNING COMMERCIAL ACTIVITY UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT

A. Goodman Raises Primarily Factual Challenges To The Decision Below

The Court of Appeals examined the record and concluded that it did not support a finding that the commercial activity exception under the FSIA applies. Accepting the truth of Goodman's factual allegations, 26 F.3d at 1144, the Court of Appeals correctly concluded that Rafidain's nonpayment had no immediate consequence in the United States.

Goodman claims that the Court "incorrectly asserted" facts regarding the source of Rafidain payments, engaged in improper factual "speculation" and failed to refer to the "actual course of events." Petition at 6, 11, 13. Goodman's arguments regarding the facts only serve to emphasize that certiorari should not be granted in this case. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); *see Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens J.).

Goodman's petition repeatedly distorts the facts by implying that performance of the letters of credit took place in the United States.[4] As Goodman knows, Ireland -- not the

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[4] *See, e.g.*, Goodman's premise for its "Reasons For Granting The Writ" (the issue is whether a foreign state loses immunity "when it breaches a contractual obligation *long performed in the United States*") (Petition at 7, emphasis added); Goodman's "Question Presented" ("Must a contract designate the United States as a place of payment . . .") (Petition at (i)); Goodman's characterization of the district court's decision below (motion granted "on the ground that the letters of credit did not *specifically designate* the United States as the place of payment . . . ." (Petition at 5, emphasis in original).

United States -- was the place of payment of the letters of credit. (At oral argument in the district court, Goodman's counsel conceded that "there was no requirement" for anything to be done within the United States.) Thus, performance on the letters of credit took place either at the place of payment (Ireland) or at the place of issuance (Iraq), but in no event in the United States. *See* Dolan, *The Law of Letters of Credit* ¶ 4.02 at 4-6 (2d ed. 1991); *see also Chuidian v. Philippine Nat'l Bank*, 976 F.2d 561, 562-63 (9th Cir. 1992).

B. The Decision Below Follows The Relevant Statute and Case Law

The Court of Appeals properly construed the FSIA's commercial activities exception and the two recent opinions of this Court addressing that exception.

1. The Court Below Correctly Interpreted And Applied Weltover

The Court of Appeals carefully examined and applied *Weltover* to this case, finding that "[t]he situation here is quite different" from *Weltover*. 26 F.3d at 1146. Goodman attacks the Court of Appeals' decision by obfuscating a critical distinction between *Weltover* and this case: in *Weltover* the United States was the place of performance for Argentina's ultimate contractual obligations. Thus, Argentina's failure to perform had an "immediate consequence" in the United States: "Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming." 112 S. Ct. at 2168. Here, by contrast, the United States was *not* the place of performance under the letters of credit.[5] Rafidain's default,

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[5] In *Weltover*, the bonds issued by Argentina expressly provided that they could be paid in New York, among other cities. 112 S. Ct. at 2164. Goodman tries to make its action appear closer to *Weltover* by stating that

(Footnote continued)

therefore, had no "immediate consequence" or "direct effect" in the United States. *Id.*

With all its stretching to fit within *Weltover*, Goodman stops just short of making the explicit statement that New York was the *place of performance* for Rafidain's contractual obligations. Instead, attempting the ploy that if an idea is repeated often enough it assumes the ring of truth, Goodman litters its petition with vague assertions that Rafidain made payments in the United States. *See, e.g.*, n. 4, *supra*. Thus, Goodman asserts that Rafidain, in paying the *first* letter of credit (L/C No. 19/31598), transferred dollars from a New York account to "another New York account selected by Goodman." Petition at 4. Goodman does not contend, however, that payment to Goodman was made in the United States by such transfer or that it was Goodman's account that received the funds.[6] At most, money was transferred *through*

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the bonds at issue "*did not require payment*" in the United States. Petition at 11 (emphasis in original). To the contrary, the bonds explicitly designated the place of payment to include New York, at the creditors' option, and the plaintiffs did elect to receive payment there. *Id.*

Goodman further alters the facts in *Weltover* by asserting that Argentina had not performed any of its ultimate contractual obligations in New York. Petition at 11 n.8. In fact, Argentina made interest payments into plaintiffs' New York accounts in satisfaction of its contractual obligations. *Id.* at 2168.

[6] In the Court of Appeals, Goodman described the role of this New York bank as the "advising bank" on the first letter of credit. Notably, the bank that issues the letter of credit (*i.e.*, Rafidain) selects the advising bank. *See* Article 12 of the Uniform Customs and Practice for Documentary Credits (1983 Revision); McCullough, *Letters of Credit*, § 1.05[2][a] at 1-38 (1992).

Indeed, Goodman has not claimed that the New York bank it "selected" was asked to pay, accept, or negotiate the first letter of credit. Therefore, under the rules governing international letters of credit, the bank assumed no undertaking in the transaction. *Id.* at Article 11(c); McCullough, *Letters of Credit* at § 1.05[2][a] at 1-38.

this New York account to Goodman in Ireland, and only to make payment on the first letter of credit, 99% of which has been paid. Moreover, transferring money through a New York bank to effect payment in Ireland does not constitute payment in New York. *See Chuidian*, 976 F.2d at 563.[7]

Goodman also asserts that the court below noted "Rafidain's admission that 25 of the 37 payments had taken place *in* the United States." Petition at 6 (emphasis in original). This statement is patently false. Rafidain made no such admission and the court noted none. Instead, the court noted Rafidain's admission that certain payments "under the first letter [of credit... were] paid *from* United States accounts." 26 F.3d at 1147 n.3; App. 7a n.3 (emphasis added).

Try as it might to distort the record and the Court of Appeals' decision, Goodman cannot dispute that the place of performance of the letters of credit was outside the United States. Thus, the decision below does not narrow or contravene *Weltover* in any respect.

2. The Theoretical Retention Of Funds In Rafidain's Accounts Was Not A "Direct Effect" Under The FSIA

Straining to find a "direct effect" under Clause 3 of the FSIA, Goodman argues that because of Rafidain's nonpayment, "U.S. bank accounts retained large sums of money that

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[7] Of $27,319,979.36 due under the first letter of credit, all but $233,932.97 was paid. *See* Complaint, App. 40a. Even if Rafidain's alleged payments on the first letter of credit "through" another New York bank had jurisdictional significance, this would only affect Goodman's claim for relief on that letter of credit. It is of no consequence with respect to the thirteen other contracts for which Goodman has brought suit. *See* 28 U.S.C. § 1330(a) (district court has jurisdiction over any "claim for relief" with respect to which the foreign state is not entitled to immunity). The FSIA does not allow Goodman to bootstrap a single, relatively small claim into subject matter jurisdiction for $300 million of other claims.

otherwise would have been depleted to pay Goodman." Petition at 12. Goodman's assertion does not comport with the facts or the law.

An effect is "direct" if it flows as an *immediate* consequence of the foreign state's act. *Weltover*, 112 S. Ct. at 2168. Here, the letters of credit contain no requirement as to the source of Rafidain's payments. Rafidain was free to select the sources of funds for payment and, indeed, often made payments to Goodman using funds from bank accounts outside the United States. *See* n.9, *infra*.

Moreover, there was no agreement or understanding between the parties that designated, earmarked, or escrowed funds in U.S. accounts specifically to pay Goodman. Conceivably, therefore, Rafidain could have depleted its New York accounts by withdrawing the funds in those accounts for another purpose. Thus, Rafidain's default on its obligations to Goodman did not *necessarily* result in a retention of funds in its New York accounts. Goodman's purported "direct effect" is, at best, a theoretical possibility:

> The requirement that an effect be "direct" indicates that Congress did not intend to provide jurisdiction whenever the ripples caused by an overseas transaction manage eventually to reach the shores of the United States.

United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n, 33 F.3d 1232, 1238 (10th Cir. 1994).

Even assuming that Rafidain's breach resulted in the "non-depletion" of U.S. accounts, such an effect is merely incidental to the transactions at issue. "Certainly *Weltover* does not stand for the proposition that any involvement in a commercial transaction by a United States bank means that a defendant's activity has had a 'direct effect' in the United States." *Id.*

Aside from twisting the holding of a recent Second Circuit decision, Goodman fails to cite any federal court decision where the purely fortuitous retention of funds in a United States account satisfied the "direct effect" test.[8] Goodman suggests *Weltover* itself is supportive because it is a "mirror image" of this case; instead of funds failing to come into the United States, funds failed to be transferred out of the country. Petition at 10, n.7. The critical distinction -- which Goodman keeps ignoring -- is that in *Weltover* funds were *supposed* to be transferred into the United States. Thus, the default in *Weltover* had a necessary consequence in the United States.

Here, neither performance -- nor any act leading up to performance -- was *supposed* to occur in the United States. Rafidain's default had, at most, a possible incidental effect in New York, but certainly not a "direct effect" under the FSIA. *See United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1237-38 (10th Cir. 1994) (although United States bank was necessarily involved in transaction to convert proceeds of documentary credit into U.S. dollars, seller's default did not have a "direct effect" in the United States); *Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 948 F.2d 90 (2d Cir. 1991) (Antares I) *vacated*, 112 S. Ct. 3020 (1992), *on remand*, 999 F.2d 33, 36 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994) (where Nigerian Airport

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[8] Goodman erroneously contends that *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238 (2d Cir. 1994) held that "the failure to pay *from* New York accounts creates a 'direct effect in the United States.' " Petition at 10 n.7. Under the syndicate loan agreements at issue, Rafidain and its guarantor, Central Bank of Iraq, were required to make payments *in* the United States (to certain lead banks) by transferring monies into New York bank accounts. 15 F.3d at 241. The Second Circuit held that "[t]he failure of the Iraqi Banks to remit funds in New York, as they were contractually bound to do, had a direct effect in the United States under *Weltover*." *Id.*

detained U.S. plaintiff's plane in Nigeria as security for overdue airport fees and released the plane only after plaintiff made payments from New York accounts, airport's acts did not have a "direct effect" in the United States).

3. The Record Demonstrates That There Was No History Or Customary Practice Regarding Payment Of The Letters Of Credit

Judge Wald's concurring opinion suggests that a failure to make payment outside the United States "might" cause a direct effect here if there is a "longstanding consistent customary practice" to use funds from a United States account. 26 F.3d at 1147. Assuming Judge Wald's speculative view of the "direct effect" standard is consistent with *Weltover*, it is nonetheless inapplicable here because, as Judge Wald noted, Goodman made no allegation in its complaint that it was Rafidain's "longstanding and consistent practice" to use U.S. funds to make payments on the letters. *Id.*

Indeed, Goodman's complaint establishes that there was no longstanding customary practice with respect to the letters of credit. While fourteen letters of credit are at issue here (Complaint, App. 36a-37a), the tables in Goodman's complaint plainly show that there were no payments (or only minimal payments) with respect to all but three of the letters. *See* Complaint, App. 44A, 47a, 48a, 50a, and 51a. As Rafidain stated to the Court of Appeals, the letters of credit underlying 99 percent of Goodman's dollar claims and 60 percent of Goodman's deutsche mark claims have *no payment history whatsoever.*[9]

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[9] In addition, notwithstanding Goodman's assertions to the contrary (Petition at 4, 14) the record contains Rafidain's discovery responses, in which it denied that 12 of its payments involved the use of funds from New York accounts.

C. Goodman Was Not Entitled To Complete Discovery On Allegations The Court Assumed To Be True, Nor Was It Entitled To A Remand To Amend Its Complaint.

Goodman desperately attempts to assign error to the district court for denying it further discovery and to the Court of Appeals for failing to remand so that Goodman could amend its complaint. Petition at 14, 15. Goodman's pleas ring hollow and do not constitute "special or important" reasons for granting a writ of certiorari.

As for discovery, Goodman argues that it should have been permitted to prove that United States funds were used to make all 37 payments. However, because Rafidain made a facial challenge to Goodman's jurisdictional allegations under Fed. R. Civ. P. 12(b)(1), the district court (and Court of Appeals) assumed Goodman's allegations to be true, App. 16a. Goodman was not entitled to further discovery to prove allegations the court assumed to be true. *Riggs v. City of Albuquerque*, 916 F.2d 582, 586 (10th Cir. 1990), *cert. denied*, 499 U.S. 976 (1991).

In any event, Goodman is not being straightforward in complaining about unfinished discovery. The discovery outstanding at the time the district court ruled was unrelated to Goodman's claim that Rafidain used New York accounts to fund the payments it made on the letters of credit. Moreover, Goodman did not move to compel responses to any of its outstanding discovery, effectively foreclosing its complaint about incomplete discovery now. *See America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 801 (9th Cir. 1989). The district court did not abuse its discretion in curtailing unnecessary and burdensome discovery. *See Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 788 (D.C. Cir. 1983), *cert. denied sub nom., Naartex Consulting Corp. v. Clark*, 467 U.S. 1210 (1984).

Goodman also argues -- for the first time -- that it should have been allowed to amend its complaint to supplement its jurisdictional allegations. Goodman never asked the Court of Appeals for such relief, either in its briefs or, remarkably, in its petition for rehearing. In any event, any such amendment would have been futile because Goodman's proposed amendment (that Rafidain made its payments to Goodman using funds from U.S. accounts) would not have affected the court's decision. The cases Goodman cites in support of its argument (Petition at 14) are inapposite because they involve requests under Fed. R. Civ. P. 15 to amend pleadings to conform to the evidence (*Brandon v. Holt*, 469 U.S. 464 (1985) and *Forman v. Davis*, 371 U.S. 178 (1962)), or, in the case of *Conley v. Gibson*, 355 U.S. 41 (1957), a determination that plaintiff's complaint contained sufficient allegations to sustain its claims.

Siderman de Blake v. Argentina, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993) is also inapposite. In *Siderman*, the Ninth Circuit found jurisdiction under the first two clauses of § 1605(a)(2) and remanded the action. Because the Ninth Circuit had also found that plaintiffs might have a contract claim based on nonpayment in the United States, the court ruled that on remand plaintiffs should be permitted to amend their pleadings and pursue subject matter jurisdiction under Clause 3 as well. *Id.* at 711. Unlike *Siderman*, there is no claim or allegation here that -- if true -- would bring Goodman any closer to subject matter jurisdiction.

Indeed, *Siderman* dispels another Goodman myth -- that the courts below incorrectly imposed upon Goodman the ultimate burden of proof on the jurisdiction question. Petition at 16 n.13. It is the plaintiff who has the "initial burden of alleging jurisdiction under the FSIA." 965 F.2d at 707. Only when the plaintiff's allegations (assumed to be true) and its uncontroverted evidence bring the claims within an FSIA

exception does the burden shift to the foreign state to establish that any relevant exceptions do not apply. *Id.*

There was no improper burden-shifting here; instead, Goodman never got out of the blocks. Its jurisdictional allegations, *on their face*, are insufficient to sustain a finding of jurisdiction under Section 1605(a)(2) of the FSIA. Again, contrary to Goodman's claims, the courts below neither abused their discretion nor committed legal error.

II. THERE IS NO CIRCUIT COURT SPLIT OVER THE SCOPE OF THE "DIRECT EFFECT" CLAUSE.

A. Post-Weltover Cases

Goodman makes the farfetched argument that the Court of Appeals' decision "exacerbates a circuit split" regarding the direct effect clause which, despite *Weltover*, "continues to flourish . . . ." Petition at 17. Yet Goodman cites only three post-*Weltover* circuit court decisions that interpret Clause 3 (Petition at 17-22). None of these cases contradict either *Weltover* or each other.

In both *United World Trade* and *Antares II* (discussed at 11-12, *supra*), the courts found no direct effect under Clause 3. Thus, these decisions do not conflict with the Court of Appeals' decision. Moreover, they do not depart from this Court's teaching in *Weltover*. In *United World Trade*, the Tenth Circuit considered whether a breach of a contract that called for foreign currency payments to be exchanged to U.S. dollars caused a direct effect in the United States. (The currency exchange had previously been undertaken through a New York bank.) The Circuit Court held that because payments under the contract were due at defendant's bank in Paris, "Paris was specified as the place of performance for [plaintiff's] contractual obligation." 33 F.3d at 1237. "[T]he instant case differs in a significant respect from *Weltover*: no part of the contract in this case was to be performed in the

United States." *Id.* In other words, the failure to exchange currency in the United States was not a "direct effect" of the defendant's alleged default. *Id.* This case plainly does not conflict with *Weltover*.

Similarly, the Nigerian government's conduct in *Antares II* had no "direct effect" in the United States because the Nigerian government's acts (including its alleged tortious conduct) did not have an immediate consequence in the United States. 999 F.2d at 36. Applying *Weltover*, the court determined that plaintiff's withdrawal of funds from a New York bank account (to pay Nigerian airport fees) was not *required* and had nothing to do with defendants' alleged misconduct. *Id.* Thus, no "direct effect" in the United States was found.

The third post-*Weltover* circuit decision cited by Goodman, *Commercial Bank of Kuwait* (discussed at n.8, *supra*), is strikingly similar to *Weltover*. There, Rafidain Bank and its guarantor, Central Bank of Iraq, were required to make payments in New York. 15 F.3d at 241. Applying *Weltover*, the Second Circuit held that defendants' failure "to remit funds in New York, as they were contractually bound to do, had a direct effect in the United States under *Weltover*." *Id.* All three post-*Weltover* cases cited by *Goodman* are entirely consistent with *Weltover* and each other.

B. Pre-Weltover Cases

Goodman absurdly argues that pre-*Weltover* cases are split on the "direct effect" clause. Petition at 19-21. It is axiomatic that there cannot be a "conflict" with a decision that has lost authoritative weight by reason of a subsequent decision of this Court.

Goodman relies principally on the Ninth Circuit's decision in *Meadows v. Dominican Republic*, 817 F.2d 517 (9th Cir.), *cert. denied*, 484 U.S. 976 (1987). However, *Meadows* is entirely consistent with *Weltover* and does not

conflict with the decision below. In *Meadows*, the Ninth Circuit found that the agreement at issue called for payment in the United States. 817 F.2d at 523. Thus, unlike Rafidain, the foreign state in *Meadows* was obligated to perform its contractual obligations in the United States. The Ninth Circuit concluded that the defendant was subject to the court's jurisdiction under Clause 3 of Section 1605(a)(2) because "the effect of the foreign state's commercial activity was in the United States . . . ." *Id.*[10]

The litany of additional pre-*Weltover* cases that *Goodman* cites as contributing to the "circuit split" do nothing to suggest a split and, like other decisions Goodman cites, are either misdescribed or vastly different from the facts here. Petition at 19, 20. Indeed, at least one of the decisions adopted the "substantiality" and "foreseeability" criteria expressly rejected in *Weltover*. *See America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 798 (9th Cir. 1989).

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[10] In describing *Meadows*, Goodman attributes to the Ninth Circuit a statement actually made by the district court, which Goodman quotes out of context. The Ninth Circuit did *not* say that the "direct effect" test is satisfied where the defendant "could *reasonably have expected* that payment would be called for at a bank in the United States," regardless of whether the contract specifically referred to the United States, as Goodman contends. Petition at 19. In addition, the district court's complete statement demonstrates that the contract at issue plainly contemplated performance in the United States: "Thus the contract *entitled plaintiffs to specify* the place of payment; since plaintiffs reside in the United States, defendants could reasonably have expected that payment would be called for at a bank in the United States." *Meadows*, 628 F. Supp. 599, 605 (N.D. Cal. 1986) (emphasis added). The district court reached this conclusion because the contract at issue called for payment at plaintiff's bank (without identifying a specific United States bank). *Id.* at 604-05.

In all the circuit court decisions upholding jurisdiction under clause 3, the transactions at issue had far more connections to the United States than the attenuated, incidental and fortuitous connection that Goodman relies upon here, *i.e.*, Rafidain's voluntary use of funds from U.S. accounts to make payments in Ireland on letters of credit issued in Iraq. The result below would have been no different in any other circuit court.

III. THE PETITION SHOULD BE DENIED BECAUSE THE COURT OF APPEALS' DECISION CAN BE SUSTAINED ON ALTERNATE GROUNDS

There are several additional grounds, not reached by the courts below, which support the dismissal of Goodman's complaint.

A. The District Court Lacked In Personam Jurisdiction Over Rafidain

Under the FSIA, if an exception to immunity is found and process is properly served, the court may exercise *in personam* jurisdiction over the foreign state. 28 U.S.C. § 1608; *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1028 (D.C. Cir. 1982). The analysis, however, does not end there. Rafidain is entitled to the same due process protections under the Fifth Amendment to the United States Constitution as any other defendant in a United States court.[11]

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[11] As a corporation, Rafidain is a "person" entitled to assert the protection of the Due Process Clause of the Fifth Amendment. *See Gilson*, 682 F.2d at 1028-29. While this Court in *Weltover* questioned whether foreign states proper are "persons" for purposes of the Due Process Clause (citing the rule that States of the United States are not), the Court did not suggest that a state-owned corporation is not a "person" for purposes of the Due Process Clause. *Weltover*, 112 S. Ct. at 2169.

General Jurisdiction. Rafidain does not have a jurisdictional presence in the United States and thus the assertion of general *in personam* jurisdiction over it would offend Constitutional notions of due process and fairness. Rafidain has no branch, office or agency in the United States, and Rafidain is neither incorporated or registered to do business in the United States. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 411 (1984). Goodman contended below that Rafidain utilized bank accounts in the United States to carry on business elsewhere. This does not render a non-resident defendant subject to the general jurisdiction of the court. *See, e.g., First Chicago Int'l v. United Exchange Co.*, 836 F.2d 1375, 1378 (D.C. Cir. 1988) (quoting *Helicopteros*, 466 U.S. at 416) ("As the Supreme Court has stated, the mere fact that a plaintiff accepts checks drawn on a bank in particular forum 'is of negligible significance' for determining whether plaintiff has sufficient contacts with that forum").

Specific Jurisdiction. Goodman's claims of breach of contract do not arise out of or relate to any of Rafidain's alleged activities in the United States. *See International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). Rather, this action arises from the sales of goods from Ireland to Iraq, the issuance of letters of credit in Iraq, and the nonpayment of the letters of credit in Ireland. The letters of credit were neither negotiated nor executed in the United States, and payment of the letters of credit did not involve the use of any agent or employee of Rafidain in the United States. *See, e.g., Hasenfus v. Corporate Air Servs.*, 700 F. Supp. 58, 63 (D.D.C. 1988) (under both the long-arm statute and the Due Process Clause, the district court lacked personal jurisdiction over defendant in breach of contract action where the contract was neither negotiated nor executed in the District of Columbia).

The exercise of personal jurisdiction over Rafidain would be unconstitutional because (i) it is not "reasonable" to require Rafidain to defend this suit in the United States and (ii) Rafidain did not purposefully avail itself of the protections

and benefits of the United States laws vis-a-vis this litigation such that Rafidain could anticipate being hauled into court here. *See World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92, 297 (1980); *Mizlou Television Network, Inc. v. National Broadcasting Co.*, 603 F. Supp. 677, 682 (D.D.C. 1984).

B. Forum Non Conveniens

This action is also subject to dismissal because the United States is a wholly inconvenient forum for the parties to adjudicate their dispute. England, where Goodman initially commenced this action, is certainly a more appropriate and convenient forum. Goodman is located there (and not in the United States). Similarly, Rafidain has a branch there (and not in the United States). *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

C. International Comity

Goodman's first action against Rafidain arising out of the nonpayment of the letters of credit was brought in the English High Court. That action was stayed by the initiation of involuntary bankruptcy proceedings against Rafidain. Goodman should not be permitted to seek a preference by pursuing a new action in the United States for the same relief. The granting of comity to a foreign bankruptcy proceeding allows the "assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion." *In re Gercke*, 122 B.R. 621, 631 (Bankr. D.D.C. 1991) (*quoting Cunard S.S. Co. v. Salen Reefer Servs. A.B.*, 773 F.2d 452, 458 (2d Cir. 1985)). Under longstanding principles of international comity, this action should be dismissed in deference to the liquidation proceedings in England. *Petition of Brierley*, 145 B.R. 151, 162 n. 5 (Bankr. S.D.N.Y. 1992) (citing *Cornfeld v. Investors Overseas Services, Ltd.*, 471 F.Supp. 1255 (S.D.N.Y.) *aff'd*, 614 F.2d 1286 (2d Cir. 1979) (Canadian proceeding); *In re*

Axona Int'l Credit & Commerce, Ltd., 88 B.R. 597 (Bankr. S.D.N.Y. 1988), *aff'd*, 115 B.R. 442 (S.D.N.Y. 1990), *appeal dismissed*, 924 F.2d 31 (2d Cir. 1991).

CONCLUSION

For the foregoing reasons, Respondent Rafidain Bank respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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November 23, 1994

APPENDIX

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

28 U.S.C. § 1603. Definitions

For purposes of this chapter -

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity -

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

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No. 94-765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GOODMAN HOLDINGS AND
ANGLO IRISH BEEF PROCESSORS INTERNATIONAL,
Petitioners,

v.

RAFIDAIN BANK,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Rafidain's brief in opposition offers nothing but smoke and mirrors. Rafidain attempts to dissuade this Court from granting review by (1) distorting the facts and holding below; (2) mischaracterizing the conflicting caselaw, and (3) advancing a number of "alternate" grounds—not relied on or even discussed below—to support the judgment. None of these attempts can withstand even cursory scrutiny.

1. Rafidain attempts to divert this Court's attention from the real issue in this case by injecting new facts and disregarding facts previously admitted. The question here is whether Rafidain's suspension of payment under the letters of credit *from* its bank accounts in New York *to* Goodman's bank account in Ireland caused a "direct effect in the United States." Rafidain asserts that it did not, on the ground that "the letters of

credit contain *no requirement* as to the source of Rafidain's payments." Br. Op. 10 (emphasis added). But that just begs the question: must a contract designate the United States as the place of payment in order for nonpayment by a foreign sovereign to establish a "direct effect"?

The D.C. Circuit answered "yes." Rafidain's breach had no "direct effect in the United States," the Court held, because "neither New York nor any other United States location was *designated* as the place of performance where money was supposed to have been paid *by Rafidain* or to Goodman." App. 7a (emphasis added; internal quotations omitted). Thus, in the Court's view, "Rafidain might well have paid [the letters of credit] *from* funds in the United States banks but it might just as well have done so *from* accounts located outside of the United States." *Id.* The Court did not question that a failure to pay under letters of credit *from* United States accounts could cause a "direct effect in the United States"; it simply held that no such "direct effect" was possible where the letters did not specify the United States as the source of payment.

Rafidain now attempts to distort that holding and the facts of this case by insisting that the reason no "direct effect" was found below was that the "place of payment" under the letters was Ireland, not New York. Br. Op. i, 3, 6-7. But that is like insisting that a glass cannot be half full because it is half empty. Most of the relevant payments, as Rafidain has admitted, *see* Pet. App. 14a-15a n.2, were made *from* Rafidain's accounts in New York *to* Goodman's accounts in Ireland. Those payments, therefore, had "direct effects" in *both* New York and Ireland; the two are not mutually exclusive. Rafidain's attempt to draw a dispositive distinction between payment *from* the United States and payment *in* the United States, Br. Op. 9, has no basis in the statute or in logic, and was not the theory of the courts below.

This case, moreover, arises on a Rule 12(b) motion to dismiss on the pleadings; therefore the presumption *must* be that the allegations in Goodman's complaint "embrace those specific

facts that are necessary to support the claim." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990).[1] Rafidain cannot evade review by insisting on its own version of the facts, or suggesting that resolution of this case would enmesh this Court in a factual thicket. Given the procedural posture and the holding below, this case presents a clean question of law.

2. Rafidain attempts to circumvent the circuit split described in Goodman's petition by first suggesting that it is moot in light of this Court's decision three Terms ago in *Republic of Argentina v. Weltover*, 112 S. Ct. 2160 (1992). But that case neither purported to nor did wipe off the books all previous cases applying the "direct effect" clause. Goodman's reliance on pre-*Weltover* cases, then, is hardly "absur[d]," Br. Op. 16, as that case did not raise (and thus could not resolve) the issue here—whether a foreign sovereign's wrongful suspension of pattern of prior payment from the United States created a "direct effect" although the contract did not specifically designate the United States as place of payment. To the extent *Weltover* sheds any light on that question, it strongly supports *Goodman*'s point: the "direct effect" clause should be interpreted in a manner consistent with commercial reality, and not narrowed by reliance on any mechanical formula. *See, e.g.*, *Weltover*, 112 S. Ct. at 2168 (rejecting prevailing view that "direct effect in the United States" incorporates *independent* requirements of substantiality and foreseeability). Far from *relying* on *Weltover*, thus, the D.C. Circuit took pains to *distinguish* it: "The situation here is quite different." App. 7a. Rather, the court relied primarily on a pre-*Weltover* case, *International Housing Ltd. v. Rafidain Bank*, 893 F.2d 8, 11-12

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[1] Thus, Rafidain is not entitled to the negative inference that because it admitted to making only 25 of the 37 payments from *inside* the United States, the other 12 must have been made from *outside* the United States. Br. Op. 10, 12 n.9. To the contrary, as noted in text, at this stage all factual inferences must be drawn in *Goodman*'s favor.

(2d Cir. 1989), holding that a foreign sovereign's nonpayment cannot have a "direct effect in the United States" where a contract does not require payment from United States accounts, although past payments had actually been made from such accounts.[2]

On the merits, Rafidain's efforts to distinguish away the split are in vain. Rafidain simply reiterates the misleading assertion that this case does not involve "payment in the United States," and then asserts that the cases supporting Goodman did. Br. Op. 16-17. But those cases clearly establish (and logic supports) the proposition that the issue of "direct effect in the United States" cannot be resolved solely by scrutinizing the four corners of a contract. That would be to exalt form over substance. The issue, rather, is whether the parties "could *reasonably have expected* that payment would be called for at a bank in the United States." *See Meadows v. Dominican Republic*, 817 F.2d 517, 523 (9th Cir.), *cert. denied*, 484 U.S. 976 (1987) (internal quotation omitted). And Rafidain only

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[2] Contrary to Rafidain's implication, *see* Br. Op. 15-16, the "direct effect" issue continues to bedevil the lower federal courts in *Weltover*'s wake. *See, e.g., United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1236-1237 (10th Cir. 1994); *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 241 (2d Cir. 1994); *Federal Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1291 (3d Cir. 1993); *Antares Aircraft v. Federal Republic of Nigeria*, 999 F.2d 33, 34 (2d Cir. 1993); *Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines*, 965 F.2d 1375, 1387 (5th Cir. 1992); *Antares Aircraft v. Federal Republic of Nigeria*, 948 F.2d 90, 94-95 (2d Cir. 1991); *Reed Int'l Trading Corp. v. Donau Bank AG*, 1994 WL 621280, *2-*3 (S.D.N.Y. Sept. 30, 1994); *National Bank of Kuwait v. Rafidain Bank*, 1994 WL 376037, *5-*6 (S.D.N.Y. 1994); *Dibrell Bros. Tobacco Co. v. Rafidain Bank*, 1994 WL 324331, *2 (D.D.C. 1994); *Gabay v. Mostazafan*, 151 F.R.D. 250, 255, n.8 (S.D.N.Y. 1993); *Maizus v. Weldor Trust Reg.*, 820 F. Supp. 101, 104 (S.D.N.Y. 1993); *Kao HWA Shipping Co. v. China Steel Corp.*, 816 F. Supp. 910, 918 (S.D.N.Y. 1993); *Optopics Labs. Corp. v. Savannah*, 816 F. Supp. 898, 907 (S.D.N.Y. 1993); *Drexel Burnham Lambert Group, Inc. v. Committee of Receivers for A.W. Galadari*, 810 F. Supp. 1375, 1386-1387 (S.D.N.Y. 1993).

undermines its own position by noting that one of Goodman's cases, *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 798 (9th Cir. 1989) found "direct effect" jurisdiction in the absence of a contractual designation despite applying the *additional* (and erroneous) requirements of "foreseeability" and "substantiality." *A fortiori*, the conclusion of jurisdiction there conflicts with the conclusion of no jurisdiction here.

3. Finally, Rafidain offers three "additional grounds, not reached by the courts below," to uphold the judgment: (1) personal jurisdiction, (2) forum non conveniens, and (3) international comity. Br. Op. 18-21. This Court's docket, however, is not limited to cases where a party seeking review must necessarily prevail under any conceivable theory. To the contrary, the Court routinely grants review even in cases where the party seeking review might ultimately lose, reversing and remanding for further consideration of other issues and theories. *See, e.g., Powell v. Nevada*, 114 S. Ct. 1280, 1283 (1994); *Elder v. Holloway*, 114 S. Ct. 1019, 1021 (1994); *Wyatt v. Cole*, 112 S. Ct. 1827, 1834 (1992); *Molzof v. United States*, 112 S. Ct. 711, 718 (1992). The D.C. Circuit squarely based its judgment on its conclusion that Rafidain's breach caused no "direct effect in the United States," and that is the issue presented for review here. Rafidain's attempt to inject other issues into the case at this stage is a transparent diversionary ploy.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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